Supreme Court, U.S.
FILED
06-953 JAN 9 - 2007
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

TYRONE SMITH,
Petitioner,

v.

DONALD DORSEY, Warden,
Western New Mexico Correctional Facility,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an immunity agreement that requires a prosecution witness to testify to a particular version of events, on pain of losing the benefit of the agreement and facing prosecution, violates the defendant's right to due process under clearly established federal law?

2. Whether counsel who fails to challenge an immunity agreement that requires a prosecution witness to testify to a particular version of events renders ineffective assistance?

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PETITION FOR A WRIT OF CERTIORARI

Tyrone Smith petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-10) is unreported. The Magistrate Judge's findings and recommended disposition (App. 11-66) and the order of the district court adopting the Magistrate Judge's recommendations (App. 67-68) are unreported. The orders of the Second Judicial District Court of New Mexico denying Smith's state petition for a writ of habeas corpus (App. 71-81) and of the Supreme Court of New Mexico denying Smith's petition for a writ of certiorari (App. 69-70) are unreported. The opinion of the Supreme Court of New Mexico on direct appeal (App. 82-127) is reported at 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

JURISDICTION

The court of appeals entered judgment on October 12, 2006. App. 1. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2254(d)(1) provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

Tyrone Smith stands convicted of the first-degree murder of Jerol Younger. No physical evidence connected Smith to Younger's killing. The prosecution's case rested heavily on the testimony of Frank Lucero, an immunized accomplice witness who was himself a suspect in the murder. Lucero's immunity agreement required him, on pain of losing his immunity and facing prosecution for Younger's murder, to testify in accordance with the story he had previously told prosecutors, which exculpated him and inculpated Smith. Despite the plainly coercive nature of the

immunity agreement, Smith's counsel failed to seek exclusion of Lucero's testimony or to otherwise challenge the lawfulness of the agreement. This Court should grant certiorari to remedy the patent injustice of a conviction obtained through means calculated to distort the factfinding process.

I. NATURE OF THE CASE.

A New Mexico grand jury indicted Smith, Denise Spikes, and Matt Brown on June 10, 1994. The indictment charged Smith with an open count of murder; conspiracy to commit murder; three counts of tampering with evidence; and bribery of a witness. RP 2.[1]

Trial began on September 12, 1995. In its opening statement, the prosecution contended that Smith killed Younger because he was jealous of Younger's alleged sexual relationship with Spikes (Smith's girlfriend and Younger's former wife) and because Spikes expected to receive life insurance proceeds from Younger's military policy. T. 9/13 at 119-20. The defense contended that Lucero, an admitted user of crack cocaine, had killed Younger, an alleged drug dealer, over a drug debt that Lucero could not pay. T. 9/13 at 126-28, 131.

Lucero testified for the prosecution under an agreement that gave him complete immunity for his conduct in connection with Younger's murder, provided that he complied with certain conditions. SX 44A; T. 9/15 at 147-

[1] The Appendix filed in the United States Court of Appeals for the Tenth Circuit will be cited as "Aplt. App." The Record Proper filed in the New Mexico Supreme Court will be cited as "RP"; trial transcripts will be cited as "T." followed by the date and page; transcripts from the evidentiary hearing on Smith's state habeas petition will be cited as "HT" followed by the date and the page; and prosecution trial exhibits will be cited as "SX."

48; *see* App. 26; Aplt. App. 1006-08. The first condition of the immunity agreement required Lucero to "give complete and truthful statements of all facts known to him regarding the murder of Gerol Younger Jr as represented by his attorney and set forth in paragraph 1 through 11." Aplt. App. 1008. Paragraphs 1 through 11, in turn, began "The State understands the following facts to be," and then recited two pages of alleged facts that exculpated Lucero and inculpated Smith and Brown. Aplt. App. 1006-07. Paragraph 8 set forth at length what Lucero allegedly told his aunt, Linda Satomba, about Younger's murder. Aplt. App. 1006-07. Paragraph 11 recited a version of the murder that Lucero's attorney provided. Aplt. App. 1007.

The fourth condition of the immunity agreement declared that "[t]his agreement will be null and void if any credible evidence is subsequently discovered that Frank Lucero participated in the murder by helping, assisting, encouraging, aiding or abetting other than what has been disclosed to the State through investigation and by his attorney Bill Parnall." Aplt. App. 1008. The agreement further provided that "[i]f any of the conditions fail, the agreement may be declared null and void by a party to the agreement, however the District Attorney agrees to consider, in good faith, any cooperation and assistance provided by Frank Lucero before proceeding on any charges against Frank Lucero." Aplt. App. 1008. To underscore Lucero's obligation to comply with the agreement, including the requirement that he testify to the facts recited in the first condition, a final provision added: "If any of the conditions fail, Frank Lucero can be prosecuted." Aplt. App. 1008.

Despite a defense request, the trial court refused to instruct the jury that it must consider the testimony of immunized accomplice witnesses with greater caution than that of ordinary witnesses. Instead, in accordance with New

Mexico law, the court gave a general credibility instruction that makes no reference to immunity or to accomplice witnesses. RP 234, 271; T. 9/22 at 12-13.

On September 25, 1995, the jury found Smith guilty of first-degree murder, conspiracy to commit first-degree murder, and two counts of evidence tampering. T. 9/25 at 7-11; RP 286-91, 300. On February 19, 1996, the court sentenced Smith to life in prison plus twelve years. T. 2/19/96 at 11-13; RP 311.

Smith appealed his conviction to the New Mexico Supreme Court. Among other issues, he argued that Lucero's immunity agreement was impermissibly coercive. The Supreme Court affirmed Smith's conviction. Applying a "fundamental error" standard of review, because Smith's counsel had not objected in the trial court, the court found that Lucero's immunity agreement did not violate due process. App. 90-95. The court declared: "While it is possible to interpret [the agreement] as Defendants argue--that is, as compelling Lucero to testify to a particular story, whether truthful or not--the record supports a conclusion that the prosecutor did not intend to compel Lucero to testify other than truthfully and that Lucero understood he was to testify truthfully." App. 91. The "record" on which the court relied consisted of Lucero's trial testimony that he understood that his agreement was to tell the truth and the arguments of defense counsel to similar effect. App. 91-95.

On July 19, 1999, Smith filed a petition for writ of habeas corpus (later amended) in the Second Judicial District Court of New Mexico. Smith's amended petition asserted (among other claims) that Lucero's immunity agreement was impermissibly coercive and that his trial counsel was ineffective for failing to challenge the agreement. In October 2001, the state court conducted a two-day evidentiary

hearing. At the hearing, the lead prosecutor testified that he had the authority to determine whether Lucero had violated the immunity agreement and, if so, whether to revoke it and prosecute him. Aplt. App. 1332. The prosecutor further acknowledged that the first condition of the immunity agreement could fairly be read to mean that if Lucero's testimony departed in some material way from the facts recited at paragraphs 1 through 11 of the agreement, he would be in breach of the agreement, Aplt. App. 1215; that if Lucero had testified in a way that differed materially from that recitation of facts, the state would have revoked the agreement under the first condition and prosecuted him, even if that testimony was proven to be truthful, Aplt. App. 1323-25; that if the state's only objective had been to have Lucero tell the truth, the first condition could have ended after the reference to Younger--there was no need for the phrase "as represented by his attorney and set forth in paragraph 1 through 11," Aplt. App. 1319-20; and that if Lucero had testified at trial that he committed the homicide and that testimony had proven to be true, the state would have revoked his immunity agreement under the fourth condition and prosecuted him, Aplt. App. 1325-26; *see* Aplt. App. 1216.

Smith's trial counsel testified at the state habeas hearing that he did not file a motion to exclude Lucero's testimony on the ground that his immunity agreement was coercive because he did not think about it before trial. Aplt. App. 1217. Counsel acknowledged that he had seen many immunity agreements in the course of his career, but he could not recall one other than Lucero's that recited the state's understanding of the facts at the beginning. Aplt. App. 1262. Nor could the lead prosecutor, who had been a prosecutor for 15 years, recall a similar agreement. Aplt. App. 1321. Trial counsel testified that although he cross-examined Lucero at trial, it would have been preferable to

exclude his testimony entirely. Counsel agreed that there was no inconsistency in filing a pretrial motion to exclude Lucero's testimony on the basis of the immunity agreement and, if that failed, cross-examining him at trial. Aplt. App. 1263.

Following the hearing, the state court denied Smith's petition. App. 71-81. Without acknowledging the testimony cited above, the court found that the Lucero immunity agreement did not cause his testimony to be "inherently unreliable" and that "Lucero's credibility was properly left to the jury." App. 73. It added that "[t]he prosecutor did not intend to compel Lucero to testify other than truthfully and Lucero understood he was to testify truthfully." App. 73.

Smith sought discretionary review from the New Mexico Supreme Court through a petition for writ of certiorari. The petition raised the related issues of Lucero's immunity agreement and ineffective assistance of counsel. The Supreme Court denied the petition without comment on August 25, 2003. App. 69-70. This Court denied Smith's petition for a writ of certiorari. *Smith v. Lucero*, 540 U.S. 1165 (2004).[2]

On March 9, 2004, Smith filed his petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of New Mexico. Aplt. App. 9. The state moved to dismiss the petition. Aplt. App. 717. The Magistrate Judge recommended that the motion be granted. App. 11-66; *see* App. 26-29 (addressing ineffective assistance claim), 49 (addressing due process claim). Over Smith's objection, the district court adopted the Magistrate

[2] In his petition, Smith presented a single issue: Whether the Due Process Clause requires the trial court to give a specific instruction directing the jury to consider the testimony of immunized accomplice witnesses with caution when the prosecution's case rests substantially on such testimony.

Judge's findings and recommended disposition and entered judgment dismissing Smith's petition with prejudice. App. 67-68.

The United States Court of Appeals for the Tenth Circuit granted Smith a certificate of appealability on a number of issues, including whether Lucero's immunity agreement was impermissibly coercive and whether his counsel was ineffective for failing to move to exclude his testimony on that basis. After oral argument, the court of appeals affirmed the denial of Smith's habeas petition. App. 1-10. Addressing the immunity agreement issue, the court recognized that "all parties agree that this particular agreement is quite unusual." App. 8. But the court adopted the position of the Magistrate Judge that "there was nothing on the record that would tend to show Lucero was coerced into testifying as he did." App. 8 (quoting Magistrate Judge's findings). Similarly, the court affirmed the district court's conclusion that Smith's counsel was not ineffective for failing to move to exclude Lucero's testimony. App. 5-7.

II. STATEMENT OF THE FACTS.

Jerol Younger was an Air Force sergeant based at Kirtland Air Force Base in Albuquerque. He appears also to have been a drug dealer. T. 9/22 at 15. On the morning of September 14, 1992, a passer-by found his body, wrapped in bags and sheets and bound with duct tape, half-submerged in an irrigation ditch in southwest Albuquerque. T. 9/14 at 5-9. Younger had been beaten with a hammer and strangled. T. 9/14 at 13-16; T. 9/18 at 133-45. Later that day, investigators discovered his car--a white BMW with California vanity plate "KOOL J"--parked in a grocery store lot about a mile from the ditch. T. 9/14 at 21-22, 54.

In September 1992, before Younger's killing, Lucero's cousin Peter saw a light-complected black man (a

description fitting Younger) drop Lucero off twice in a white BMW. T. 9/21 at 79-80. During the month following Younger's death, Lucero became nervous when he saw the police. According to his then-girlfri[illegible]d, "We'd be cruising down the road or going somewhere and he would see a police car and he would actually just duck underneath my seat and hide. He would hide, literally, just underneath the seat." T. 9/18 at 159, 161. Lucero's cousin Peter testified that he acted "real strange" and "scared." T. 9/21 at 81. Lucero told another cousin, Denise Purcell-Abeyta, and her housemate that he "needed a place to stay because he was running from the cops." T. 9/21 at 110, 144. They described him as "[p]anicky, scared." T. 9/21 at 110, 145. Lucero finally admitted to the women that he killed Younger because "he had owed [Younger] some money for some drugs." T. 9/21 at 111, 137-39, 145; *see* App. 4-5, 14-15, 86.

Shortly after Younger's killing, detectives received information that Lucero may have been involved. T. 9/14 at 27-28. In mid-October 1992, they searched Lucero's dwelling--a small, free-standing room a mile from the ditch where Younger's body was found. T. 9/14 at 24-33, 50, 57. Lucero's room had been burned. Detectives found a hammer head and handle, plastic garbage bags, duct tape, and cords similar to those used to bind Younger. T. 9/14 at 44-47; *see* App. 14.

At about the time the police searched his room, Lucero traveled with Smith to visit Spikes in San Diego, California and then began living with his aunt, Linda Satomba, in San Jose. T. 9/14 at 145; T. 9/19 at 87-88. A few months later, in early 1993, he told Satomba his version of Younger's killing. T. 9/14 at 145-46. According to Satomba, Lucero told her that he was at a friend's house; that Smith came over with Brown and they went back to Lucero's room; that Smith brought a television in and put it in

Lucero's closet; that a man and a woman arrived, and Smith told the man that the television was "over there"; that when the man went to the closet, Smith and Brown grabbed hammers or tools and began hitting him; that the woman ran away; that Lucero got scared, but Smith and Brown would not let him leave; that Smith and Brown continued beating the man; that he fell on the floor, and Smith and Brown tied him up with tape; that Smith put a bag over the man's head; that Smith told Lucero to take the man's keys, put on a pair of gloves, and get rid of the man's car; that Lucero did not want to comply with Smith's directive, but he did; that he wanted to run after dropping off the car, but Smith and Brown appeared in a truck and made him get in; that they returned to Lucero's room; that Smith and Brown told Lucero to start the truck; that they carried the man out and loaded him in the truck; that Lucero drove the truck to a ditch; and that Smith and Brown dumped the man there. T. 9/15 at 181-84.

In early 1994, police came to Satomba's workplace in San Jose looking for Lucero. She falsely denied knowing where he was. T. 9/15 at 186-87. On May 17, 1994, the police returned and Satomba gave them a statement recounting Lucero's version of events. T. 9/15 at 187, 191-93. Lucero was jailed briefly in California until his attorney could negotiate an immunity agreement. T. 9/15 at 99-106. In early June, Lucero and Satomba travelled to Albuquerque. On June 9, 1994, they appeared before the grand jury. Before Lucero testified, and before he gave any statement to law enforcement, he signed the immunity agreement requiring him to conform his testimony to what "[t]he State understands the . . . facts to be," including Satomba's account of what Lucero had allegedly told her about the killing. Aplt. App. 1006-08. The grand jury indicted Smith, Brown, and Spikes. RP 2. Lucero and Satomba both testified at trial

to the version of events incorporated in Lucero's immunity agreement.

Following a severance, Spikes obtained a formal order of immunity and appeared at trial as a prosecution witness. She testified that she married Younger in October 1985. They had a son, Dominic, in 1986. Younger abused Spikes physically throughout their marriage, and they divorced in April 1987. T. 9/19 at 105-06. Spikes began dating Smith in December 1989, and their relationship ended in February 1993. T. 9/19 at 32, 34.

According to Spikes, Younger resented Smith's relationship with Spikes and Dominic, who lived with Spikes. T. 9/19 at 111, 150; T. 9/20 at 23-24. Smith objected to Younger's persistent efforts to resume a sexual relationship with Spikes. T. 9/19 at 49-50, 111. In September 1992, according to Spikes, Smith decided that they should travel from California (where they were living) to Albuquerque to talk with Younger and resolve the relationship between Spikes and the two men. T. 9/19 at 53-56, 122. Spikes testified that, once in Albuquerque, she and Smith switched cars and met Brown. Spikes, Smith, and Brown then picked up Lucero. According to Spikes, the men dropped her off at a pay phone. Smith asked her to call Younger, and she did. T. 9/19 at 63, 102. Younger picked her up in his BMW, and they drove to Lucero's room.

At Lucero's room, Younger parked his car and walked to the open door, with Spikes a few steps behind him. T. 9/19 at 130. According to Spikes, someone grabbed Younger, and the door slammed shut. Spikes testified that she heard Younger cry out. T. 9/19 at 69. She ran to a pay phone some distance away to call for help. T. 9/19 at 69-70, 128. She claimed that, while she was on the telephone, Smith drove up and made her get into his vehicle. T. 9/19 at

71, 128-29. They drove back to Lucero's room. Younger's car was gone when they arrived. T. 9/19 at 72. Smith went into the room for about ten minutes, while Spikes waited outside. T. 9/19 at 73. Then Smith came out, and they drove to his mother's house. T. 9/19 at 74, 129. Spikes later asked Smith if he had killed Younger, and he adamantly denied having done so. T. 9/19 at 132-33.

In mid-1994, after reading the affidavit in support of the arrest warrant for Smith, Spikes commented to a friend that Younger "deserved what he got"; that "it was either her or him"; and that Lucero was "covering up for [her] and for himself." T. 9/20 at 78-79, 81-82.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to correct the grave injustice of a conviction obtained through an immunity agreement that, on its face, compelled a key prosecution witness, who was himself a suspect in the offense, to adhere to a story that exculpated him and inculpated the defendant. Such an agreement makes a mockery of the fundamental principle that a criminal trial represents a search for the truth.

Respondent conceded in the court of appeals that "[i]f Lucero's immunity agreement were coercive, its use to coerce his testimony would deny Smith a fair trial and due process, and the failure of Smith's counsel to object to such testimony would be ineffective assistance of counsel." Appellee's Answer Brief at 20. The critical question, therefore, is whether the agreement's requirement that Lucero "give complete and truthful statements of all facts known to him regarding the murder of Gerol [sic] Younger Jr as represented by his attorney and set forth in paragraph 1 through 11," coupled with the agreement's other conditions, compelled him to testify to a particular story.

It plainly did. The immunity agreement required Lucero to follow the script set forth in the agreement itself, on pain of forfeiting his immunity and subjecting himself to a prosecution that could land him in prison for life. The first condition of the agreement required Lucero to testify to two pages of alleged "facts" that exculpated him and inculpated Smith and Brown. Aplt. App. 1006-07. The fourth condition of the agreement provided that "[t]his agreement will be null and void if any credible evidence is subsequently discovered that Frank Lucero participated in the murder by helping, assisting, encouraging, aiding or abetting other than what has been disclosed to the State through investigation and by his attorney Bill Parnall." Aplt. App. 1008. Another part of the agreement declared that if any of the conditions failed, Lucero could be prosecuted. *Id.* Under these provisions, if Lucero's testimony had departed in a material way from the facts recited at paragraphs 1 through 11 of the agreement, he would have been in breach of the agreement, *even if his testimony was truthful.* As the trial prosecutor acknowledged, the state would have revoked the agreement and prosecuted him. Aplt. App. 1215-16, 1323-26.

It is hard to imagine any set of safeguards that could legitimize such a coercive agreement. Remarkably, the state trial court specifically rejected one of the standard safeguards that many courts require even for less coercive agreements; it refused to give the immunized accomplice witness instruction that the defense requested, T. 9/22 at 12-13, and gave instead a general instruction on credibility (New Mexico Uniform Jury Instruction 14-5020) that failed entirely to address "the testimony of accomplices" and "the nature of each accomplice's contingent agreement and the risk that it creates." *United States v. Dailey,* 759 F.2d 192, 201 (1st Cir. 1985); *see, e.g., United States v. Levenite*, 277 F.3d 454, 459-64 (4th Cir. 2002) (discussing safeguards for accomplice testimony given under a plea or immunity

agreement); *Morris v. Woodford*, 273 F.3d 826, 836 (9th Cir. 2001) (same); *United States v. Estrada*, 256 F.3d 466, 471-72 (7th Cir. 2001) (same); *United States v. Gomez*, 810 F.2d 947, 956-57 (10th Cir. 1987) (same); *see also* App. 123-25 (New Mexico Supreme Court affirms trial court's refusal to give cautionary instruction).

Given the obviously coercive nature of the Lucero immunity agreement, Smith's counsel rendered ineffective assistance by failing to seek the exclusion of Lucero's testimony under the due process clause of U.S. Const. Amend. XIV. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Counsel should similarly have sought to exclude Lucero's testimony under prevailing state law. The New Mexico Supreme Court first addressed coercive immunity agreements in *State v. Zinn*, 106 N.M. 544, 746 P.2d 650 (1987). The court concluded: "As in the federal circuits, so too in the state courts, the principal requirement for the validity of an immunity agreement is that the accomplice testify truthfully . . . ; likewise, absent an agreement that induces an accomplice to testify in a certain fashion, the testimony of an accomplice goes to credibility, not to admissibility." *Id.* at 548, 746 P.2d at 654; *see* App. 91. As the evidence at the state habeas hearing established, Lucero's immunity agreement "induce[d] [him] to testify in a certain fashion"--in strict conformity with the "facts" set forth in paragraphs 1 through 11 of the agreement--and thus violated the *Zinn* standard.

The California Supreme Court's decision in *People v. Badgett*, 895 P.2d 877 (Cal. 1995), highlights the impropriety of the Lucero immunity agreement. In *Badgett*, the court declared: "An immunity agreement that requires the witness to testify consistently with a previous statement to the police is deemed coercive and testimony produced by

such an agreement is subject to exclusion from evidence." *Id.* at 893. The court added that "when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police . . . the accomplice's testimony is tainted beyond redemption and its admission denies defendant a fair trial." *Id.* (quotations and brackets omitted).

In light of the evidence presented at the evidentiary hearing, Lucero's agreement was impermissibly coercive under the *Badgett* principles. Lucero was "granted immunity subject to the condition that his testimony substantially conform to . . . earlier statement[s] given to police" by his attorney, his aunt, and others. His testimony was therefore "tainted beyond redemption." *Id.*

Similarly, in *People v. Allen*, 729 P.2d 115 (Cal. 1986), the court declared that the defendant is denied a fair trial if the prosecution's case "'depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion.'" *Id.* at 130 (quoting *People v. Medina*, 41 Cal. App. 3d 438, 455 (1974)). The agreement in *Allen*, unlike the Lucero agreement, required the witness to "testify fully and completely" in all proceedings, *id.* at 129 n.4; the witness' testimony was therefore "conditioned only on [the witness'] truthful and complete testimony in all proceedings against the defendant" and others, *id.* at 132. In upholding the agreement, *Allen* distinguished *Medina*, which found that the defendant had been denied a fair trial where two key prosecution witnesses testified under agreements that required that their testimony not "materially or substantially change" from prior statements to police. *Id.* at 131. The Lucero immunity agreement, on its face and as interpreted by the prosecutor, falls squarely within the *Medina* rule. The

agreement barred Lucero, on pain of revocation and prosecution for murder, from deviating from the "facts known to him regarding the murder of Gerol Younger Jr *as represented by his attorney and set forth in paragraph 1 through 11*." Aplt. App. 1008 (emphasis added).

The courts below rested their conclusion that Lucero's agreement was non-coercive on his testimony that the agreement required him to tell the truth and the prosecutor's similar assertion at the habeas hearing. *E.g.*, App. 26-29, 72, 91-92. But this is pure bootstrapping. An immunized accomplice's testimony that he understands he must tell the truth cannot salvage an immunity agreement that defines the truth according to the prosecution's script. No immunized witness with a deal like Lucero's would *ever* admit that he felt pressured to stick with the prosecution's story. And the prosecutor's testimony at the habeas hearing means little, given his extraordinary admission that if Lucero had testified in a way that differed materially from the recitation of facts on pages 1 and 2 of the immunity agreement, the state would have revoked the agreement and prosecuted him, even if that testimony was proven to be truthful. Aplt. App. 1323-26.[3] In other words, from the prosecutor's perspective and undoubtedly from Lucero's as well, the agreement required Lucero to tell the truth, but only as long as the truth coincided with the state's view of the facts.

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[3] The prosecutor also acknowledged at the habeas hearing that if the state's only objective had been to have Lucero tell the truth, the first condition of the immunity agreement could have simply required Lucero to "give complete and truthful statements of all facts known to him regarding the murder of Gerol Younger Jr." The agreement could have omitted the phrase that followed: "as represented by his attorney and set forth in paragraph 1 through 11." Aplt. App. 1008, 1319-20.

If the evidence apart from Lucero's testimony established conclusively that the version of the facts recited in the immunity agreement was true, then the coercive nature of the agreement might be less significant. A court could be reasonably confident that the agreement coerced Lucero to tell the actual truth, and not just the prosecution's theory. But here Lucero was the only eyewitness to Younger's murder. No physical evidence corroborated his claim that Smith and Brown committed the offense. And there is ample reason to believe that Lucero himself killed Younger over a drug debt. Detectives found items potentially linked to Younger's murder in Lucero's room. T. 9/14/95 at 44-47. After Younger's death, Lucero became "[p]anicky" and "scared" when he saw the police. T. 9/18/95 at 159, 161; T. 9/21/95 at 81, 110, 145. He told his cousin and her housemate that he "needed a place to stay because he was running from the cops." T. 9/21/95 at 110, 144. Lucero ultimately admitted to the women that he killed Younger because "he had owed [Younger] some money for some drugs." T. 9/21/95 at 111, 137-39, 145; *see* App. 4-5, 14-15, 86. In light of this powerful evidence of Lucero's guilt, including a confession to two witnesses, the immunity agreement--which permitted Lucero to go free as long as he exculpated himself and inculpated Smith and Brown--distorted the factfinding process.

For all of these reasons, Lucero's testimony under the coercive immunity agreement violated Smith's right to due process. The state court's contrary decision constitutes an unreasonable application of the principles announced in *Napue* and *Mooney*. Similarly, the failure of Smith's trial counsel to move to exclude Lucero's testimony constituted ineffective assistance of counsel, and the state court's contrary decision unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 2007

2006 WL 2899176

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

TYRONE SMITH, Defendant-Appellant, v. DONALD DORSEY, Warden, Plaintiff-Appellee.	No. 05-2027 (D. New Mexico) (D.C. No. Civ-04-261-MCA/LFG)

ORDER AND JUDGMENT*

Before **HENRY**, **SEYMOUR**, and **TYMKOVICH**, Circuit Judges.

(Filed October 12, 2006)

Tyrone Smith, a New Mexico state prisoner serving a life sentence appeals the district court's dismissal of his petition filed pursuant to 28 U.S.C. § 2254. Mr. Smith was convicted of first-degree murder, conspiracy, and two counts of tampering with evidence. The district court adopted the findings and recommendations of the magistrate judge and denied Mr. Smith's habeas petition and also denied Mr. Smith's request for a Certificate of Appealability ("COA"). A

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

panel of this court granted Mr. Smith request for a COA pursuant to 28 U.S.C. § 2253 on several contentions, including four ineffective assistance claims, two due process claims, a Confrontation Clause violation, and cumulative error.[1] For substantially the same reasons set forth by the magistrate judge, we deny Mr. Smith's habeas petition.

I. BACKGROUND

A. Procedural posture

After a nine-day jury trial held in New Mexico state court in September 1995, the jury convicted Mr. Smith of first-degree murder of Jerol Younger, conspiracy, and two counts of tampering with evidence, in violation of N.M. Stat. Ann. § 30-2-1(A)(1) (1994), *id.* § 30-28-2(B)(1) (1979), *id.* § 30-22-5 (1963). The state trial court sentenced Mr. Smith to life plus twelve years. The New Mexico Supreme Court rejected his direct appeal; the state district court denied Mr. Smith's postconviction petition for habeas corpus, and the New Mexico Supreme Court and the United States Supreme Court denied his petition for a writ of certiorari. Mr. Smith has exhausted each of his claims before the state courts.

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[1] We note that Mr. Smith sought, and was granted, a COA on a *Brady* claim and several Confrontation clause claims that he has chosen not to raise before us.

B. Statement of Facts

The New Mexico Supreme Court provided the following factual background when it rejected the direct appeals of Mr. Smith and his co-defendant Mr. Brown:

> On September 14, 1992, the body of Jerol Younger, an Air Force sergeant stationed at Kirtland Air Force base, was found in an irrigation ditch in south Albuquerque. He had been strangled and beaten to death. Younger allegedly was a drug dealer in Albuquerque up until the time of his death.
>
> Denise Spikes and Frank Lucero were the two main prosecution witnesses. The stories they told provided the theory of the State's case. Spikes testified as follows. She and Younger had been married at one time and had a son together. Spikes testified that Younger disliked the intimate relationship that had developed between Spikes and Defendant Smith. According to Spikes, Defendant Smith and Spikes decided to resolve the relationship with Younger by going to talk to him. Spikes called Younger from a pay phone in Albuquerque and asked him to come and get her. The two drove to Lucero's house, a small, free-standing room in Albuquerque's South Valley, where Defendants and Lucero were waiting. When Spikes knocked on the door, Younger was grabbed and taken into the house, and Spikes remained outside. She testified she heard Younger scream and she ran to a nearby pay phone. Defendant Smith, however, came to get her, apparently before she was able to phone for help. When she arrived back at Lucero's house, Younger was gone, as was his car. Defendant Smith went into the house for a few minutes, came out, and he and Spikes went to his

mother's home. Several weeks later, Spikes asked Defendant Smith if he had killed Younger and he denied it.

Lucero, who was in the room at the time of the killing, testified as follows. He said that he was at his girlfriend's house when Defendant Smith came to the door and said that he needed to go to Lucero's house because someone was going to pick up a television. Lucero testified that he got into a Blazer belonging to Defendant Smith's mother, in which Spikes and Defendants were seated. They drove to Lucero's house and entered. Lucero testified that Defendant Smith and Spikes left, and Defendant Smith returned alone with a television, which he placed in the closet. Lucero stated that he heard a car drive up, and heard two voices; he recognized one as the voice of Spikes, and the other as male. The man entered, and Defendant Smith told the man that the television was in the closet. When he went to the closet, Defendants attacked the man with hammers. Lucero testified that Spikes was walking in at the time, but that the door must have closed on her. Lucero testified that Defendant Brown retrieved a gun from a bag and held it on the man while Defendant Smith tied him. Defendant Smith then told Lucero to put on gloves, take the man's car keys, and get rid of the car. Lucero did so. Afterwards, Defendant Smith found Lucero and brought him back to his house. The man was still on the floor at Lucero's home. The three men loaded the body into a truck and dumped his body in a ditch.

Following the murder, Lucero became very anxious around police officers. According to Lucero's cousin, Denise Purcell-Abeyta, and her roommate, Matilda Gonzales, Lucero admitted to

killing Younger because he owed Younger money for drugs. Shortly after this, police attempted to search Lucero's home, but it had been burned down. In the remains of the house, however, the police found a hammer head and handle, plastic bags, duct tape, and cords similar to those used to tie up Younger. Around the time of the search, both Lucero and Defendant Smith left the state and traveled to San Diego to visit Spikes.

In San Diego, Lucero stayed with his aunt, Linda Satomba. When police located Satomba, she initially denied knowing his whereabouts. Later, though, she told police Lucero had related to her a story similar to his trial testimony. According to Satomba, Lucero never admitted to killing Younger. Satomba testified at trial regarding Lucero's statements. Her testimony was admitted under the prior consistent statement rule.

Lucero was given transactional immunity and Spikes was given use immunity to testify at trial. Defendants were convicted of first degree deliberate intent murder, conspiracy to commit first degree murder, and two counts of evidence tampering. They were sentenced to life imprisonment plus twelve years.

New Mexico v. Brown, 969 P.2d 313, 317-18 (1998).

II. DISCUSSION

This court granted Mr. Smith a COA on eight issues: Issues (1) through (4) involve ineffective assistance of counsel for counsel's failure (1) to move to exclude Mr. Lucero's testimony because his immunity agreement was impermissibly coercive; (2) to request a limiting instruction regarding Mr. Lucero's prior consistent statements to

Ms. Satomba; (3) to present evidence that would have shown that Ms. Spikes' motive to lie arose before she made certain prior consistent statements to Ms. Jimenes and Ms. O'Grady; and (4) to object under NMRA 11-403 to testimony concerning Ms. Spikes' prior inconsistent statements. The remaining contentions are (5) Mr. Lucero's immunity agreement violated Mr. Smith's due process rights because it was impermissibly coercive; (6) New Mexico's theory of admissibility regarding Ms. Satomba's out of court statements violated Mr. Smith's due process rights; (7) Mr. Smith's Confrontation Clause rights were violated via stipulation regarding the testimony of Karen Thomas; and (8) cumulative error violated Mr. Smith's right to due process.

To succeed on his § 2254 petition, Mr. Smith must establish that the New Mexico Supreme Court's decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "[A] determination of a factual issue made by a State court shall be presumed to be correct." *Id.* § 2254(e)(1); *Smith v. Mullin,* 379 F.3d 919, 924-25 (10th Cir. 2004). We review the district court's legal analysis of the state court decision de novo.

The magistrate judge considered and rejected each of these claims on the merits. We have considered the magistrate judge's thorough and lengthy findings, the district

court's order, the briefs, and the entire record on appeal. For substantially the same reasons articulated by the magistrate judge in its well-reasoned findings and recommended disposition, we deny Mr. Smith's petition for habeas corpus.

First, the magistrate judge correctly determined that none of issues (1) through (4) met *Strickland v. Washington's* deficient performance or prejudice prongs. 466 U.S. 668, 688 (1984). The New Mexico district court determined that Mr. Lucero's testimony was not inherently unreliable and that his credibility was properly left to the jury. It found there was no reasonable probability that a motion to exclude the testimony would have been successful. We agree with the magistrate judge that this was not an unreasonable application of federal law.

Second, as to the limiting instruction, the New Mexico district court determined such an instruction "would have had little value and would not have changed the outcome of the case." Aplt's App. vol. V, at 1192. We agree that neither prong of *Strickland* has been met and this was not an unreasonable application of clearly established federal law.

Third, as to Ms. Spikes' motive to lie, the state court determined that "[r]easonably competent attorneys would have concluded that there was greater potential for damage in presenting this evidence than in using existing evidence to establish when Ms. Spikes' motive to lie arose." *Id.* at 1196-97. The magistrate judge determined that the decision to call a witness is a trial tactic, and agreed that Ms. Jimenes and Mr. Tolbert would have made statements that were prejudicial to the defense. We agree with the magistrate judge's conclusions.

Fourth, as to failure to object under NMRA 11-403, the New Mexico state court found this decision to be a tactical one, and concluded that "a reasonably competent attorney would have decided not to object under Rule 403 to testimony of Spikes' prior inconsistent statements since such objections would have been overruled" and there is no evidence "that such an objection would have affected the outcome of the trial." Aplt's App. vol. V, at 1198. The magistrate judge stated there was "nothing unreasonable" about the state habeas proceeding's outcome and that "[t]he testimony was of more than marginal relevance." *Id.* vol. III, at 805 (Magistrate Judge's Findings and Recommended Disposition). "[This] court cannot say that exclusion of this testimony would have made a difference in the outcome of the trial. . . ." *Id.* at 806. We agree that the New Mexico court's ruling was not an unreasonable application of federal law.

Fifth, as to the coercive nature of Mr. Lucero's immunity agreement, which included several paragraphs prepared by the government as to what his testimony would be, all parties agree that this particular agreement is quite unusual. Mr. Lucero promised to testify truthfully, and the New Mexico Supreme Court determined that the agreement did not coerce Mr. Lucero into doing otherwise.

The magistrate judge found that there was "nothing on the record that would tend to show Lucero was coerced into testifying as he did." *Id.* at 799. Although both Mr. Smith's counsel and the attorney for the State found the agreement to be "unusual," this acknowledgment "does not establish that the agreement was coercive." *Id.* We agree with the magistrate judge that the New Mexico Supreme Court's decision was not an unreasonable application of

federal law nor was it based on an unreasonable determination of the facts in light of the evidence presented.

Sixth, as to whether the admission of the prior consistent statements from Ms. Satomba supporting Mr. Lucero's version of events violated Mr. Smith's due process rights, the New Mexico Supreme Court held the evidence was improperly admitted as substantive evidence, but any error was harmless because the statements could come in as rehabilitative evidence. The magistrate judge determined that "[t]here was sufficient legal basis for the [state] supreme court to rule that the testimony was proper as rehabilitation evidence, after Lucero's credibility was attacked on cross-examination." *Id.* at 827. Moreover, "[a]lthough the evidence was admitted at trial as non-hearsay under Rule 801, the prosecution did not unduly emphasize Satomba's testimony in closing argument. . . . The Court cannot say that the State argued to the jury that Satomba's testimony constituted substantive evidence of Smith's guilt." *Id.* We agree with the magistrate judge's conclusion that the state supreme court's reasoning was not an unreasonable application of federal law, nor did it render the trial fundamentally unfair.

Seventh, Mr. Smith's Confrontation Clause argument fails because Ms. Thomas was a defense witness, who would not be subject to cross-examination by Mr. Smith. We agree with the New Mexico Supreme Court's conclusion that Mr. Smith

> cannot expect that [he] would be able to present Thomas' testimony in the form of a stipulation without the State bringing out in the stipulation how [he] would expect Thomas to testify on cross-examination. We agree with the State's contention that Defendant[ ] accepted paragraphs nine

> and ten of the stipulation in order to gain the first eight paragraphs of the stipulation.

969 P.2d at 323.

Eighth and finally, having found no error in any of those rulings, we must conclude that there was no cumulative error.

III. CONCLUSION

Accordingly, we AFFIRM the district court's denial of Mr. Smith's § 2254 petition for habeas corpus.

Entered for the Court,

Robert H. Henry
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TYRONE SMITH,

Petitioner,

vs. No. CIV 04-261 MCA/LFG

DONALD DORSEY, Warden,
Western New Mexico Correctional Facility,

Respondent.

MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDED DISPOSITION[1]

(Entered Nov. 18, 2004)

Findings

1. This is a proceeding on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, filed March 9, 2004. Petitioner Tyrone Smith ("Smith") challenges the judgment and sentence entered by the Second Judicial District Court in *State v. Tyrone Smith,* No. CR 94-1321 (County of Bernalillo, New Mexico). Respondent filed his Answer on May 10, 2004. On May 12, 2004, Respondent filed a Motion to Dismiss the Petition [Doc. 10], along with a supporting memorandum. Smith filed a response to the

[1] Within ten (10) days after a party is served with a copy of these findings and recommendations, that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to such findings and recommendations. A party must file any objections with the Clerk of the U.S. District Court within the ten-day period allowed if that party wants to have appellate review of the findings and recommendations. If no objections are filed, no appellate review will be allowed.

motion on June 9, 2004. Respondent's Motion to Dismiss is now ready for ruling.

Factual and Procedural History

2. Jerol Younger's ("Younger's") body was found in a ditch in Albuquerque in September 1992, covered with plastic garbage bags and sheets and wrapped in cords and duct tape. Younger received several hammer blows to the head and his body also showed signs of asphyxia, possibly strangulation. It was unclear whether Younger was still alive at the time his body was put into the ditch.

3. On June 10, 1994, Smith was indicted, along with Denise Spikes ("Spikes") and Matt Brown ("Brown") on charges of murder, conspiracy, tampering with evidence, and bribery of a witness. Smith pled not guilty. Smith and Brown were tried together, Spikes' case having been severed prior to trial. The jury found Smith guilty of first degree murder, conspiracy to commit murder, and tampering with evidence. He received a sentence of life plus twelve years.

4. At trial, the primary evidence against Smith was Spikes' testimony and that of Frank Lucero ("Lucero"). Spikes is the ex-wife of the victim, Younger, and is the mother of his child. She was Smith's girlfriend at the time of the murder. She testified at trial under a grant of use immunity. Spikes said that Smith was jealous of Younger's continued attentions to her and that in September 1992, Smith forced her to drive to Albuquerque with him from her home in California in order to confront Younger about the situation. Spikes said that after they arrived in Albuquerque they joined up with Brown, who was Smith's

friend, and then drove over to a house in Albuquerque to collect Smith's cousin, Lucero.

5. Spikes further testified that the four of them got into Smith's vehicle and drove to Lucero's apartment in Albuquerque's South Valley. She said that she and Smith let the others off there and the two of them then drove to downtown Albuquerque, where Smith told Spikes to call Younger and have him drive her back to Lucero's place. She called Younger, and he picked her up in his white BMW. When she and Younger arrived at Lucero's, Spikes said, they got out of his car and walked up to the apartment. As they approached the front door, she saw some hands grab Younger and pull him inside, and the door slammed in her face.

6. Spikes said that she then heard Younger scream and she ran away on foot, looking for a telephone. By the time she reached a pay phone, however, Smith drove up, prevented her from making a phone call, and made her get into his car. They then drove back to Lucero's apartment, where Smith went back inside for a moment while she waited in the car. She noticed that Younger's car was no longer there. Later that day, she drove back to California alone. She said she learned later that Younger was dead.

7. Lucero also testified for the State, under a grant of transactional immunity. For the most part, his testimony coincided with Spikes' version of events. Lucero stated that Smith and Brown picked him up at his girlfriend's house and took him to his own apartment in the South Valley, where they said someone was coming by to pick up a television set. Lucero said that Smith and Spikes then left the apartment, and Smith later returned alone with a television set, which he placed in Lucero's closet.

Awhile later, he said, he heard a car drive up outside. He heard two voices, one of them Spikes'. Only one person entered the apartment, however, a man whom Lucero said he didn't know.

8. Lucero testified that when the man, later identified as Younger, approached the closet to look at the TV, Smith and Brown attacked him with a hammer. Lucero said further that Brown held a gun on Younger while Smith tied him up. Smith told him to take Younger's car away from the apartment and leave it somewhere, and he did so. As he was walking back from dropping off the car, he said, Smith picked him up and drove him back to the apartment. Lucero said he helped Smith and Brown load the body into a vehicle and put it in the ditch.

9. Other evidence at trial revealed that Lucero's apartment was destroyed in a fire shortly after the murder. Fire investigators identified the cause as arson. In the building's remains, police found a broken hammer, plastic bags, duct tape and cords. No fingerprint evidence was found on Younger's body after it was pulled from the ditch, nor in the apartment after the fire. No blood or other physical evidence was found linking Smith and Brown to the murder.

10. Other trial testimony relevant to the issues raised by Smith includes the following. Lucero's cousin Denise Purcell and another woman testified that shortly after Younger's body was found, Lucero told them he murdered Younger because he owed him money for drugs. There was also evidence that Lucero was drinking heavily after the murder and that he had used crack cocaine on two occasions, a few weeks before and a few weeks after the day of the murder. There was also testimony that prior

to the murder, Lucero had been seen with a man in a white BMW whose description might have matched Younger's. This was the only evidence of a link between Lucero and Younger prior to the killing.

11. A witness testified that Younger had been seen in his own apartment handing a package to another man, in what might have been a drug deal. The stipulated testimony of Officer Karen Thomas was admitted into evidence; she stated that she had been investigating Younger for possible drug activity in the months prior to his death, although charges were never brought. She also stated that she knew of no link between Younger and Lucero.

12. Lucero's aunt, Linda Satomba, testified that sometime after the murder in 1992, Lucero came to live with her in San Jose, California. He was in an agitated state and appeared nervous and afraid. She questioned him about his changed appearance and behavior, and he eventually told her, in bits and pieces, about the events of September 1992. Her testimony as to what he said was consistent with Lucero's testimony which implicated Smith and Brown in the murder.

13. Theresa Jimenes, a friend of Spikes' with whom she lived in California, testified that Spikes told her, about a month before the murder, that Smith asked her to help him kill Younger so they could collect insurance money. Another friend, Constance O'Grady, testified that in June 1994, Spikes told her that she and Smith, along with Lucero and Brown, had planned in advance to kill Younger, and that Spikes' role was to lure Younger to the place where he was to be murdered. O'Grady said further that Spikes told her that she didn't want to do it, but Smith threatened to kill her and harm her son if she didn't

go along. On the stand, Spikes specifically denied that she made either of these statements to Jimenes or O'Grady.

14. Following his conviction and sentence, Smith appealed to the New Mexico Supreme Court. His appeal was consolidated with that of Matt Brown. The state supreme court affirmed the convictions in an opinion filed September 16, 1998,[2] and denied Smith's motion for rehearing on November 5, 1998.

15. On July 19, 1999, Smith filed a petition for habeas corpus in state district court. The district judge held an evidentiary hearing and issued an order on June 19, 2003 denying Smith's habeas corpus petition. Certiorari was denied by the state supreme court on August 25, 2003, and by the United States Supreme Court on January 26, 2004.

16. Smith filed his petition for federal habeas relief in the Court on March 9, 2004. The Court finds that Smith's petition for habeas corpus is timely.

Grounds Asserted for Habeas Relief

17. Smith presents four claims of ineffective assistance of counsel (Claims IA-ID), and seven other claims for relief (Claims IIA-IIG), as grounds for federal habeas review, as follows:

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[2] The New Mexico Supreme Court's opinion is titled *State v. Brown*, 126 N.M. 338, 969 P.2d 313 (1998); however, in these Findings and Recommended Disposition, that opinion will be referred to as *State v. Smith*.

Claims of Ineffective Assistance of Trial Counsel

Claim I A. Counsel failed to request a limiting instruction that Lucero's prior consistent statements, presented during the testimony of Linda Satomba, were admissible for the purpose of rehabilitation only, and not for the truth of the matter asserted.

Claim I B. Counsel failed to move, prior to trial, to exclude Lucero's testimony on grounds his transactional immunity agreement with the State was impermissibly coercive.

Claim I C. Counsel failed to present evidence that Spikes' motive to lie arose at the time of the murder in September 1992, rather than later, when police questioned her in January 1993, thus rendering inadmissible Theresa Jimenes' testimony about prior consistent statements made by Spikes shortly after the murder in September 1992.

Claim I D. Counsel failed to object under NMRA 11-403 to testimony of Constance O'Grady and Theresa Jimenes, former friends of Spikes, who testified that Spikes made prior statements, inconsistent with her trial testimony, to the effect that she and Smith had formed plans to kill Younger.

Other Constitutional Claims

Claim II A. The prosecution violated the rule of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), by failing to disclose police investigation records showing that other victims were murdered using the same modus operandi that Younger's killer used; and the trial court violated Smith's due process rights by refusing to conduct an evidentiary hearing on this issue or to require production of the information.

Claim II B. The trial court violated Smith's right of confrontation by imposing a stipulation regarding the

testimony of Officer Karen Thomas, which included her statement that she could not connect Lucero with Younger's drug operation.

Claim II C. The Lucero immunity agreement violated Smith's right to due process because it was impermissibly coercive.

Claim II D. The trial court violated Smith's right to confrontation by barring cross-examination of Lucero about his prior efforts to exculpate himself. In addition, the trial court violated Smith's rights to due process, to compulsory process, and to trial by jury in that the court: (1) refused to permit Smith to present evidence through cross-examination of Lucero regarding his prior drug-related activities to show Lucero's connection with Younger and his motive to commit the murder; (2) refused to permit Smith to present evidence of Lucero's use of intoxicants during the time of certain events about which he testified; and (3) refused to give a cautionary instruction about the testimony of an addict.

Claim II E. The New Mexico Supreme Court violated Smith's right to due process by upholding the trial court's admission of Lucero's prior consistent statements on grounds not cited by the trial court.

Claim II F. The trial court violated Smith's right to due process by failing to give an instruction on the lesser included offense of voluntary manslaughter.

Claim II G. Smith's due process rights were violated by the cumulative effect of all of the above errors.

Discussion

18. All of the above claims were presented to the state courts, either on direct appeal or in state habeas

proceedings or both. A federal court is precluded from granting habeas relief on any claim adjudicated on the merits by the state courts, unless the state proceeding resulted in a decision that was contrary to or involved unreasonable application of clearly established federal law – that is, if the state court arrived at a conclusion opposite to that reached by the Supreme Court on a question of law; or unless the state court decision was based on an unreasonable determination of the facts in light of the evidence presented – that is, if the state court confronted a set of facts materially indistinguishable from a decision of the Supreme Court and nevertheless arrived at a different result. 28 U.S.C. § 2254(d); *Williams v. Taylor,* 529 U.S. 362, 406, 413, 120 S.Ct. 1495 (2000); *Smallwood v. Gibson,* 191 F.3d 1257, 1264-65 (10th Cir. 1999).

19. A federal court may not issue a habeas writ "simply because we conclude in our independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Gipson v. Jordan,* 376 F.3d 1 193,1196 (10th Cir. 2004). "Federal habeas courts do not sit to correct errors of fact or to relitigate state court trials. Our jurisdiction is limited to ensuring that individuals are not imprisoned in violation of the Constitution." *Thompson v. Oklahoma,* 202 F.3d 283 (Table, text in Westlaw), No. 98-7158, 2000 WL 14404, at *6 (10th Cir. Jan. 10, 2000); *Scrivner v. Tansy,* 68 F.3d 1234, 1238 (10th Cir. 1995).

20. With these standards in mind, the Court turns to Smith's eleven claims of constitutional violation.

Claim IA

Ineffective Assistance of Counsel in Failing to Request a Limiting Instruction on Satomba's Testimony

21. Smith argues that his trial attorney was constitutionally ineffective in four specific ways. To establish ineffective assistance of counsel, Smith must make a two-pronged showing: (1) that counsel's performance was constitutionally defective; and (2) that the deficient performance prejudiced the defense in that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984).

22. To prove deficient performance, Smith must overcome the presumption that counsel's conduct was constitutionally effective. *Duvall v. Reynolds,* 139 F.3d 768, 776 (10th Cir. 1998). Scrutiny of counsel's performance must be "highly deferential" and must avoid the distorting effects of hindsight. *Miles v. Dorsey,* 61 F.3d 1459, 1474 (10th Cir. 1995). In order to be found constitutionally ineffective, trial counsel's performance must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy. *Hoxsie v. Kerby,* 108 F.3d 1239, 1246 (10th Cir. 1997).

23. Each of the four alleged failings by trial counsel was raised in Smith's state habeas petition and was explored in an evidentiary hearing on the petition. All claims of ineffectiveness were rejected by the state district court in a carefully crafted and detailed written opinion, and certiorari was denied by both the state supreme court and the United States Supreme Court. The claims have been thoroughly exhausted, and this Court must apply the deferential standard of review as set out in 28 U.S.C. § 2254(d) and as explained in *Williams v. Taylor, supra.*

24. Smith's first charge of ineffectiveness is that his attorney failed to request a limiting instruction advising the jury that Lucero's prior consistent statements, presented during the testimony of his aunt Linda Satomba, were admissible solely to rehabilitate Lucero's credibility and not for their substantive truth. Smith claims that the result of the proceeding would have been different if Smith's trial counsel had requested this instruction.

25. New Mexico Rule of Evidence 11-801(D)(1)(b) corresponds to Fed. R. Evid. 801(d)(1)(B). Both exclude from the definition of hearsay a prior statement, consistent with the declarant's trial testimony, which is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. At the time of Smith's trial, the Supreme Court had recently decided *Tome v. United States,* 513 U.S. 150, 115 S. Ct. 696 (1995), a case arising in the District of New Mexico. In *Tome,* the Court held that prior consistent statements, in order to be considered non-hearsay and therefore admissible as substantive evidence, must have been made prior to the time the motive to fabricate, or the alleged improper influence or motive, arose. Otherwise, such statements would be admissible only to rehabilitate a declarant whose credibility was attacked on cross examination.

26. Lucero was an important witness for the prosecution. He testified that in 1993, he was living with his aunt Linda Satomba and shared with her his account of Younger's murder, an account which was highly incriminating to Smith. [TR 3, at 145-46]. He was cross-examined about this statement, and about the immunity deal he made with the State, by attorneys for both defendants. The questioning on cross-examination was designed to raise the implication that Lucero lied in order to obtain

the immunity deal and that his testimony falsely portrayed him as an innocent bystander. [TR 4, at 19-20; 99-106].

27. Linda Satomba also testified at trial and described for the jury what Lucero told her about the murder. The trial court overruled Smith's hearsay objections to this testimony. Smith's counsel argued that Lucero's motive to fabricate arose at the time of the murder, and his statements to Satomba were therefore not admissible as substantive evidence under Rule 801(D)(1)(b). Counsel also repeatedly objected during Satomba's testimony, arguing the testimony was straying beyond the confines of the Rule. The court rejected these arguments and allowed the testimony to come in on grounds Lucero's motive arose "at the time the deal was struck," that is, at the time he entered into the immunity agreement with the State. [TR 4, at 178-198, 221].

28. The New Mexico Supreme Court agreed with defendants that Lucero's motive to fabricate arose at the time of the murder and not, as the trial court found, at the time of his arrest two years later, and held that the ruling by the trial judge was therefore erroneous. *State v. Smith, supra* 126 N.M. at 348-49. However, the court upheld admission of Satomba's testimony on the ground that the statements were admissible to rehabilitate Lucero, whose credibility had been attacked earlier in cross examination.

> There is language in *Tome* that suggests that . . . Rule 801 of the Federal Rules of Evidence [i]s the sole means of admitting prior consistent statements and that even rehabilitative uses must comply with Rule 801 and the premotive requirement. However, we do not believe that *Tome* should be interpreted so broadly or that our

> Rules of Evidence should be interpreted so narrowly. . . . [W]e conclude that Rule 11-801 does not prohibit certain limited rehabilitative uses of prior consistent statements.

State v. Smith, supra, 126 N.M. at 350-51.

29. Smith filed a motion for rehearing on this ruling, which was denied by the Supreme Court. [Answer, Exs. G-K]. He next filed a habeas petition in state court, raising *inter alia* the argument that his attorneys were ineffective for failing to request a limiting instruction which would have directed the jury to consider Satomba's testimony as rehabilitation, rather than as substantive evidence of Smith's involvement in Younger's murder.

30. At the evidentiary hearing on the habeas petition, Smith's trial counsel was asked why he did not request a limiting instruction. He responded that the prosecutor offered the testimony under Rule 801 and not as rehabilitation, and that it was clear "to everyone in the courtroom" that the out-of-court statement was being admitted by the trial judge as substantive evidence. [Transcript of hearing on petition for habeas corpus in *State v. Smith,* CR 94-1321, Second Judicial District Court for the State of New Mexico, Day I, October 12, 2001, at 5; hereinafter referred to in the format, "HC I, at 5"]. Trial counsel stated further that he might have asked for a limiting instruction, "for what little value it has," if he had thought the statements were being admitted for rehabilitative purposes; however, he also said he did not think the result would have been different if he had asked for the instruction. [HC I, at 6, 32].

31. In the order denying habeas relief, the state court held, "It is clear that any limiting instruction regarding this testimony would have had little value and would not have changed the outcome of the case." [Answer, Ex. R, at 2]. The habeas judge noted further that trial counsel argued against admission of Satomba's testimony on the basis of *Tome, supra,* "which was then the controlling precedent in this area of the law," but that the trial court improperly rejected this argument. [*Id.*, at 3]. He concluded that "Defense counsel was not obligated to predict that Lucero's prior consistent statements would be admissible on another basis and request a limiting instruction. . . . It was not deficient for Petitioners' counsel to not anticipate rehabilitative use of Lucero's prior consistent statements, nor to ask for a limiting instruction." [*Id.*, at 3-4]. In addition, the habeas court implicitly found that defense counsel's failure to request a limiting instruction did not affect the outcome, as the prosecutor referred only briefly to Satomba's testimony in his closing argument and "made no argument that Satomba's testimony provided substantive evidence of petitioner's guilt." [*Id.*, at 2].

32. Thus, the state habeas court found that both prongs of the *Strickland* standard had been met, in that counsel's performance was not deficient and did not result in an unfair trial. This Court agrees. In its opinion on Smith's direct appeal, the state supreme court applied *Tome,* a recent U.S. Supreme Court decision, for the first time. Trial counsel is not required to anticipate a later ruling by a state appellate court on pain of being labeled constitutionally ineffective. Counsel in this case had reason to assume that the evidence was being admitted for substantive purposes pursuant to Rule 801(D)(1)(b), as that is the ground upon which the prosecution offered the

evidence and the ground upon which the court admitted it. Counsel therefore had no reason to request a limiting instruction to the effect that the evidence should be considered for rehabilitation only.

> [I]t is well established that when evidence is admitted for the wrong purpose, there is no error when the defendant does not request a limiting instruction. . . . In this case, it would have been pointless for Defendant to request a limiting instruction, even though he was entitled to one, because the court had already ruled that the evidence was nonhearsay under Rule 11-801(D)(1)(c). The instruction would have been denied had it been requested.

State v. Lopez, 123 N.M. 599, 604, 943 P.2d 1052, 1057 (Ct. App. 1997). It does not constitute ineffective assistance of counsel to fail to make a futile argument. *United States v. Cook,* 45 F. 3d 388, 392-93 (10th Cir. 1995). Indeed, making futile or unsupported arguments could well be counterproductive.

33. The Court finds that the ruling by the state habeas court was neither contrary to nor involved unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented, and concludes that federal habeas relief should be denied with respect to this claim.

Claim I B

Ineffective Assistance of Counsel in Failing to Seek Exclusion of Lucero's Testimony on Grounds his Immunity Agreement was Impermissibly Coercive

34. Smith's second charge of ineffectiveness is that his attorney failed to make a pretrial motion to exclude Lucero's testimony in toto, on the ground that his immunity agreement with the state was impermissibly coercive.

35. The transactional immunity agreement between Lucero and the State begins with an 11-paragraph recitation of the facts as understood by the State. The agreement then states that "Frank Lucero will give complete and truthful statements of all facts know to him regarding the murder of Gerol Younger Jr. as represented by his attorney and set forth in paragraph 1 through 11." Lucero further agreed to assist in the continuing investigation, and the State agreed not to prosecute him for his role in helping dispose of Younger's body and his car. The agreement went on to state that it would be "null and void if any credible evidence is subsequently discovered that Frank Lucero participated in the murder. . . ." [Answer, Ex. N, Ex. 1 thereto].

36. On direct examination, Lucero described his understanding of his immunity agreement to be that, "I[f] I come forth, cooperate, tell the truth to the best of my knowledge, basically cooperate and – basically just tell the truth to the best of my knowledge," then no charges would be brought against him. [TR 3, at 146]. On cross examination, he was asked whether it was his understanding that "transactional immunity" means that "for the whole incident, you have no exposure, as long as you testify truthfully and do whatever they say, right?" Lucero responded, "Come to the trials and help, yes." [TR 4, 105-106].

37. The State sought to have the agreement itself admitted into evidence. Defendants' counsel objected on grounds that the first 11 paragraphs constituted a recitation of the State's version of the facts, and it would be prejudicial and would unduly emphasize the State's case to allow the agreement into evidence. The trial court sustained the objection, noting that the agreement contained hearsay and "basically capsuliz[ed] what the state hoped the evidence to be." [TR 4, at 148-150; TR 8, at 72-73].

38. On direct appeal, Smith argued that the immunity agreement required Lucero to testify in conformance with the facts as set forth in the agreement – that is, that he had to "tell a particular story" in order to reap the benefit of transactional immunity – and this was so coercive as to deny Smith a fair trial. While acknowledging that "it is possible to interpret this language as Defendants argue – that is, as compelling Lucero to testify to a particular story, whether truthful or not," the state supreme court rejected that interpretation, finding rather that the record as a whole "supports a conclusion that the prosecutor did not intend to compel Lucero to testify other than truthfully and that Lucero understood he was to testify truthfully," and that if he did so no charges would be brought against him. The defense did not elicit anything to the contrary on cross examination. *State v. Smith, supra,* 126 N.M. at 344-346.

39. Smith's state habeas petition raised this issue as one of ineffective assistance of counsel for failing to move pretrial to exclude Lucero's testimony. At the habeas hearing, Smith's trial counsel testified that such a motion was "not something I thought about prior to trial." He stated that, while he thought Lucero was eager to please

the prosecutors, it was also his impression that Lucero was a "willing witness" and that no one twisted his arm to get him to testify. Counsel stated he has no reason to think that a motion to exclude Lucero's testimony based on coercion would have been successful, and in any event, Smith's defense team had a full opportunity cross examine Lucero at trial. [HC I, at 13, 36-38, 59-60].

40. The attorney for Smith's co-defendant Brown testified that she considered filing such a motion but, after she interviewed and deposed Lucero, she determined that the agreement was not in fact coercive and she felt such a motion would be "meritless." [HC II, at 5-7]. She also stated that neither she nor Smith's attorneys uncovered any other evidence that Lucero was coerced into testifying in a particular fashion. [HC II, at 19].

41. One of the trial prosecutors also testified at the habeas hearing. He denied that Lucero was coerced to testify in any particular way; rather, the only obligation imposed on him was to tell the truth. [HC II, at 32-36]. He stated further that the reason for including the 11 factual paragraphs in the immunity agreement was to get that information before the jury to counter the effects of what he anticipated would be vigorous cross-examination of Lucero by defense counsel. He hoped to have the immunity agreement admitted into evidence so that the jury would have these facts before them as they deliberated. [HC II, at 33, 55].

42. The state habeas judge found that the Lucero's testimony was not inherently unreliable due to the immunity agreement, and that his credibility was properly left to the jury. He further found no reasonable probability to

conclude that a motion to exclude the testimony would have been successful. [Answer, Ex. R, at 5].

43. This Court finds nothing on the record that would tend to show Lucero was coerced into testifying as he did. Lucero asserted at trial that he understood his obligation was simply to testify truthfully. The only part of the record which supports Smith's argument on this claim is the language of the immunity agreement, setting forth the facts as the State understands them to be, and the fact that both Smith's counsel and the attorney for the State found this an unusual way to draft an immunity agreement. [HC I, at 58-59; HC II, at 45]. This does not establish that the agreement was coercive.

44. The Court concludes that the New Mexico courts did not act unreasonably either on direct appeal or in the habeas proceeding. The record does not support a finding that a pretrial motion to exclude Lucero's testimony would have been successful. Smith's attorneys were not, therefore, ineffective for failing to bring such a motion, nor can the Court say that the result of the trial would have been different if they had done so.

45. The therefore finds that the rulings by the state courts were neither contrary to nor involved unreasonable application of clearly established federal law, nor were they based on an unreasonable determination of the facts in light of the evidence presented. Federal habeas relief should therefore be denied with respect to this claim.

Claim I C

Ineffective Assistance of Counsel in Failing to Present Evidence Regarding Timing of Spikes' Motive to Lie

46. The "premotive rule" of *Tome v. United States,* discussed above under Claim I(A), arises again in connection with this claim. Smith faults his counsel for failing to present "readily available evidence," in the form of testimony of certain witnesses who would have recounted Denise Spikes' efforts to establish an alibi for herself shortly after Younger's murder in September 1992. He contends that this evidence would have established that Spikes' motive to fabricate arose at the time of the murder – much earlier than the date found by the state court – and therefore would have rendered inadmissible certain prior consistent statements which Spikes made in September 1992.

47. These prior consistent statements came through the testimony of Spikes' friend Theresa Jimenes. Jimenes testified at trial, over objection by Smith's counsel, that in September 1992, Spikes told Jimenes about events she witnessed on the day of the murder. [TR 8, at 36-41]. The version of events recounted by Jimenes, as told to her by Spikes, was consistent with Spikes' testimony at the trial and was harmful to Smith's defense.

48. The issue of admissibility of Jimenes' testimony was raised in Smith's direct appeal. The New Mexico Supreme Court upheld the trial court's evidentiary ruling, finding that Spikes' motive to lie arose in 1993, when she was questioned by police regarding the murder. *State v. Smith, supra,* 126 N.M. at 352.

49. In his state habeas petition Smith argued, as he does in this proceeding, that Smith's attorney rendered

ineffective assistance in not presenting the testimony of Victor Jimenes and Rodney Tolbert, both of whom stated in pretrial interviews or depositions that Spikes asked them to provide her with a false alibi. This, Smith contends, would have established that Spikes' motive to lie arose at the time of the murder. In addition, Smith argues that statements in Spikes' own pretrial deposition would have tended to establish an earlier date for her motive to lie.

50. At the evidentiary hearing, Smith's trial attorney was asked why he did not call Mr. Jimenes and Mr. Tolbert to testify at trial. He responded that, beside the fact that the witnesses had unflattering things to say about Smith, he also felt this evidence would not have been at all helpful to his theory of the defense. [HC I, at 18-19, 40-41].

51. The state habeas judge found that trial counsel's decision not to bring the pretrial witness statements before the court was a tactical one, in that the statements by Victor Jimenes and Rodney Tolbert would have been prejudicial to the defense, and he concluded that "[r]easonably competent attorneys would have concluded that there was greater potential for damage in presenting this evidence than in using the existing evidence to establish when Spikes' motive to lie arose." He found that failure to present these statements did not affect the outcome of the trial. [Answer, Ex. R, at 6-7].

52. The decision whether to call a particular witness is a tactical decision and is nearly always seen as a matter of discretion for trial counsel. *United States v. Miller,* 643 F.2d 713, 714 (10th Cir. 1981). Trial tactics and strategy are the province of trial counsel and should not be second-guessed. It may be error to fail to call a witness in some

limited situations, for example "when that witness would present the only defense available." *Id.* But that was not the case here. The Court agrees with the state habeas court that the failure to present the pretrial statements described above, in support of the defense arguments as to when the motive to lie arose, was a tactical decision not implicating Smith's due process rights and met the "objective standard of reasonableness" of *Strickland.* In this case, as in *United States v. Snyder,* 787 F.2d 1429, 1432 (10th Cir. 1986), "it is at least as reasonable, and maybe more so, to speculate that the testimony of those witnesses would have damaged defendant's case, given the possibility of harmful statements . . . and their vulnerability on cross-examination."

53. The state habeas court's finding on this claim was neither contrary to nor involved unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. Federal habeas relief should be denied with respect to this claim of ineffectiveness.

Claim I D

Ineffective Assistance of Counsel in Failing to Object under Rule 403 to Testimony of O'Grady and Jimenes

54. In its opinion on Smith's direct appeal, the New Mexico Supreme Court found no error in the trial court's ruling admitting certain testimony by witnesses Theresa Jimenes and Constance O'Grady, who were former friends of Spikes. Their testimony included a recounting of prior inconsistent statements made to these witnesses by Spikes, which statements were harmful to Smith's defense. The supreme court stated in *dicta* that although the prior inconsistent statements were not excludable on the

grounds argued by Smith's attorneys at trial, they might have been excluded if defense counsel had made an objection under NMRA 11-403.[3] *State v. Smith, supra,* 126 N.M. at 353. Citing the state supreme court's *dicta,* Smith's counsel now argues that Smith's attorneys were ineffective in failing to seek exclusion of the testimony under Rule 403.

55. The version of NMRA 11-801(D)(1)(a) which applied at the time of Smith's trial defined as non-hearsay an out-of-court prior statement made by a declarant who testifies at trial and is subject to cross-examination, when the prior statement is inconsistent with the declarant's testimony at trial. The rule has since been amended to require that the prior inconsistent statement must have been given under oath subject to the penalty of perjury at trial; however, this requirement was not part of the rule as it applied at Smith's trial. *See, State v. Baca,* 120 N.M. 383, 391-92, 902 P.2d 65, 73-74 (1995).

56. In her testimony at trial, Denise Spikes stated that when she and Younger were divorced, he removed her as a beneficiary of his life insurance policy and that "everybody in my family and everybody knew that." She denied telling Theresa Jimenes that Younger told her she was still on his insurance policy and that if he died she would get some money. She further denied telling Jimenes that Smith wanted her help in killing Younger so they could collect the insurance money, and she also denied telling

[3] NMRA 11-403 parallels Fed. R. Evid. 403 in providing that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

Constance O'Grady her purpose in going to Albuquerque was to murder Younger. [TR 6, at 45-46; 52-53, 118-119].

57. However, Theresa Jimenes later testified, over objection by Smith's attorney, that in August 1992 Spikes told her that she and Smith had conversations in which Smith talked to her about killing Younger for his insurance money. [TR 8, at 19-25]. Smith's attorney cross examined Jimenes about this testimony [TR 8, at 51-51] and moved for a mistrial at the close of the State's evidence, on grounds the Jimenes testimony, and other evidence, was inadmissible hearsay. [TR 8, at 74-75].

58. Prior to Constance O'Grady's testimony, Smith's counsel moved to exclude her entirely on hearsay grounds, arguing that her testimony was nothing more than "improper bolstering." The trial court overruled the objections and allowed O'Grady to testify. [TR 7, at 49-53]. She said that in June 1994 Spikes told her that she and Smith, along with some others, were planning to kill Younger. She further recounted what Spikes told her about the murder. [TR. 60-64]. On cross examination, O'Grady testified that Spikes told her Younger "deserved what he got" and that "it was either her . . . or him." [TR 7, at 78].

59. In his direct appeal, Smith cited admission of Spikes' prior inconsistent statements through Theresa Jimenes and Constance O'Grady. The state supreme court upheld the trial court's admission of the testimony, stating:

> [B]ecause Spikes gave both favorable and unfavorable testimony, the prosecution was entitled to offer evidence of any prior inconsistent statements, which the trial court might have been asked to exclude under Rule 11-403, NMRA 1998. In this case, however, neither Defendant made a

> sufficiently specific objection to alert the trial court to the need to balance the probative value of the testimony in impeaching Spikes against the prejudicial effect of the particular prior inconsistent statements to which O'Grady and Jimenes testified.

State v. Smith, supra, 126 N.M. at 353.

60. Smith cited this language in his state habeas petition, arguing that if counsel had made the Rule 403 objection, "either the trial court would have excluded the evidence – thus significantly weakening the prosecution case – or a meritorious issue would have been preserved for appeal." [Answer, Ex. M, at 13]. The same argument is made in Smith's federal habeas petition.

61. At the evidentiary hearing, Smith's counsel testified that he felt "[t]here wasn't a legitimate 403 objection to be made," in part because evidence was significant, rather than collateral. He said further that he felt the grounds raised should have been sufficient to exclude the evidence. [HC I, at 21-22, 46].

62. The judge in the state habeas proceedings found that any Rule 403 objection would not have succeeded because the evidence was in fact more probative than prejudicial, and he concluded that petitioner failed to demonstrate either that a reasonably competent attorney would have made a Rule 403 objection or that such an objection, had one been made, would have affected the outcome of the trial. [Answer, Ex. R, at 7-8].

63. This Court finds nothing unreasonable about outcome of the state habeas proceeding. Rule 11-403, like its federal counterpart, requires that the prejudicial effect must "substantially" outweigh the probative value before a

403 objection will be sustained. The weightier the probative value, the greater the prejudice needed to override it. *See, United States v. Weir,* 28 F.3d 114 (Table, text in Westlaw), 1994 WL 245230, at *1 (10th Cir. June 6, 1994) (an objection under Rule 403 is successful, generally, only when the evidence sought to be excluded is of "marginal relevance" or "minimal probative value" so that the prejudicial effect substantially outweighs it). *See also, Vaughn v. Johnson,* 2001 WL 912657, at *19 (N.D. Tex. Aug. 7, 2001):

> the Court cannot find that Vaughn's attorneys' failure to object under Rule 403 fell below an objective standard of reasonableness. . . . In light of the highly relevant nature of the extraneous crimes evidence to the crucial issue in the case . . . , the Court finds that any objections by Vaughn's attorneys under Rule 403 would likely have been futile. . . . In view of the extremely probative nature of the extraneous crimes evidence . . . , the Court finds Vaughn's assumption that the trial court would have sustained the objection and precluded the evidence to be based on pure speculation.

64. The same is true in the present case. The testimony of Jimenes and O'Grady testimony, to the effect that Spikes told them she and Smith discussed killing Younger for insurance money, provided the jury with another possible motive, aside from jealously, for Smith to have wanted to kill Younger. It also tended to show that the crime was planned well in advance and was not the result of a sudden impulse or heat of passion. This testimony was of more than marginal relevance. The court had already rejected defendant's hearsay objections to the testimony, and the Court cannot say that the attorneys were deficient

in not coming back to raise a Rule 403 objection. *Garrett v. United States,* 78 F.3d 1296, 1301-02 (8th Cir. 1996):

> The failure of Garrett's attorney to move to exclude Rodriguez's testimony under Federal Rule of Evidence 403 did not fall outside the wide range of competent professional assistance. The trial judge had ruled that the testimony was not barred by the hearsay rule . . . [and] counsel may have reasonably determined that a Rule 403 objection would have been fruitless. The performance of an attorney is not deficient because the attorney failed to object to admissible evidence, . . . and the trial court had already determined that the statements were not hearsay. . . . The lack of a Rule 403 objection, moreover, does not give rise to a reasonable probability that Garrett would have been found not guilty by the jury. Speculation as to what the district court would have done if presented with this motion is not equivalent to a showing of prejudice sufficient to undermine confidence in the outcome of the trial. Nor was the evidence against Garrett flimsy or unpersuasive.

65. In this case, too, the Court cannot say that exclusion of this testimony would have made a difference in the outcome of the trial, given the fact that the Jimenes and O'Grady testimony was not entirely negative for Smith. It tended to undermine Spikes' credibility, since it contradicted Spikes' own in-court testimony, and it this testimony, along with Lucero's, that was the most damaging to Smith. While exclusion of the Jimenes and O'Grady testimony may have been somewhat helpful to Smith by eliminating an additional motive for the killing, the Court cannot say with reasonable probability that exclusion of this testimony would have changed the course of the trial.

Theirs was not the only evidence of motive and, in addition, the prosecution had eyewitness testimony which implicated Smith in the murder.

66. The state court's habeas decision on this issue was neither contrary to nor did it involve an unreasonable application of clearly established federal law, nor was it based on an unreasonable determination of the facts in light of the evidence presented. Federal habeas relief should be denied with respect to this claim of ineffectiveness.

67. The Court also rejects petitioner's argument that cumulative error by counsel rendered the trial unfair. When faced with a claim of cumulative error, the Court's job is to "asses[s] the aggregate prejudice arising from the several constitutional errors we find here." *Cargle v. Mullin,* 317 F.3d 1196, 1206 (10th Cir. 2003). No errors by counsel having been established, there is no basis for inquiring into the cumulative effect of errors.

Claim II A
Brady Violation

68. Smith claims that he was denied a fair trial because the court did not order the prosecution to supply the defense with records of police investigations of other contemporaneous killings in Albuquerque with modus operandi similar to that of Younger's killer. Smith argues that the prosecution's denial of access to this arguably exculpatory evidence violated *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), and the trial court violated his right to due process by failing to hold an evidentiary hearing or to order production of the material.

69. Prior to jury selection, Smith's attorney informed the court that the State had refused to turn over investigative reports related to the suicide of an arson investigator, as well as reports related to the murders of two prostitutes at least one of whom was found bagged and bound in a condition similar to Younger's body. Smith's counsel argued that these investigatory materials might be exculpatory in that they could provide the true explanation for the Younger homicide. [TR 1, at 3-4]. The prosecutor responded that the State did not have possession of these investigative reports and that, in any event, disclosure of this information could jeopardize ongoing investigations. [TR 1, at 6-8].

70. Shortly before the close of evidence, Smith's attorney made a proffer of evidence in an attempt to revive this issue. The proffer concerned the testimony of Officer Karen Thomas. He stated that Thomas would testify about investigations into other homicides which occurred around the time of Younger's murder and the fact that the Sheriff's Department was investigating these deaths and Younger's as related homicides. Counsel renewed his motion for the reports on these deaths, and asked the court for either a continuance so that the Smith team could develop their defense further through the use of the reports or, in the alternative, that the court declare a mistrial. The motion was denied. [TR 8, at 1-4].

71. On direct appeal, the New Mexico Supreme Court noted that Smith's information about the other homicide cases came from the newspapers, and he "surmised" that the deaths might be linked. "He had no other basis for requesting the police files on these other cases," the court continued, and "this is not enough to establish a

due process violation," which requires a showing of a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed. *State v. Smith, supra,* 126 N.M. at 344:

> There may have been a facial resemblance between the way the body of Younger and that of the other victim had been found, but that resemblance is not enough to show that it was probable that the result of the trial would have been different had the evidence been disclosed.

72. The issue was raised again in the state habeas proceedings. At the evidentiary hearing, Smith's counsel testified that he had sought disclosure of the reports on the other murders because the bodies were found in very similar situations and, as it was clear that Smith had nothing to do with those other murders, the evidence was therefore exculpatory. [HC I, at 27-28]. On cross examination, he acknowledged that although the body of one of the other two homicide victims was bagged and bound in a manner similar to Younger's, she had been shot in the head, not pummeled with a hammer as Younger had been. The other death under investigation was a suicide victim whose body was found in his car. He was not bagged and his body was not found in the ditch, although his car was parked nearby. Smith's counsel stated at the hearing that he felt there was a connection between these deaths and Younger's, based on some statements made by one of the investigating detectives to the effect that the Sheriff's department was conducting multiple investigations at the same time, and based on a witness' statement that she was acquainted with Smith, Younger, Lucero, and also with the suicide victim. [HC I, at 53-57].

73. The state habeas judge held that Smith had presented no additional information, aside from that raised on direct appeal, to justify disclosure of the investigative reports. The court concluded that there was insufficient evidence to show that the other homicides were related to Smith's case and denied the petition on this issue.

74. This Court cannot say that the state courts' rulings were unreasonable. *Brady v. Maryland, supra,* requires disclosure of material evidence which is exculpatory to the defendant, and the defense has the burden of showing the elements necessary for disclosure.

> The Constitution, as interpreted in *Brady,* does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant. *See, e.g., Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."); *United States v. Comosona,* 848 F.2d 1110, 1115 (10th Cir. 1988) ("The Government has no obligation to disclose possible theories of the defense to a defendant."). Due process only requires the disclosure of material exculpatory evidence which, if suppressed, would deprive the defendant of a fair trial. . . . Therefore, in order to establish a *Brady* violation, the defendant bears the burden of establishing: 1) that the prosecution suppressed evidence; 2) that the evidence was favorable to the accused; and 3) that the evidence was material. [Some internal punctuation omitted].

Smith v. Secretary of New Mexico Dep't of Corrections, 50 F.3d 801, 823-24 (10th Cir. 1995).

75. In this case, both the state supreme court and the state district court on habeas review found that defendant failed to meet this burden. This Court agrees. Smith's argument that the material sought was exculpatory is grounded on: (1) a statement by a sheriff's department investigator that several homicides were being investigated around the same time; (2) the fact that a witness was acquainted with three of the principals involved in this case as well as one of the other victims; and (3) newspaper reports on the other death which indicated that one victim's body was found wrapped in a manner similar to that of Younger's, although the cause of death in that case was a gunshot wound rather than hammer blows.

76. Smith argues that this evidence tends to show that someone else, presumably the person who killed these other victims, was also Younger's murderer. The Court finds this argument unpersuasive, as did the state courts, and the evidence simply insufficient to meet defendant's burden. Viewing the significance of the undisclosed evidence in relation to the record as a whole, the Court cannot say that information about these other homicides was material to Smith's case nor that the evidence was directly exculpatory. *Compare, e.g., Banks v. Reynolds,* 54 F.3d 1508, 1518 (10th Cir. 1995), wherein two eyewitnesses positively identified someone other than the defendant as the perpetrator of the crime.

77. Smith also faults the trial court for failing to hold an evidentiary hearing on the issue of whether the materials sought were in fact exculpatory. No motion for

such a hearing was made, however. The Court finds that the state courts' decisions on the *Brady* issue were neither contrary to nor involved an unreasonable application of clearly established federal law, nor were they based on an unreasonable determination of the facts in light of the evidence presented. Federal habeas relief should be denied with respect to this claim.

Claim II B
Imposition of the Karen Thomas Stipulation as Violating the Right of Confrontation

78. Smith claims that the trial court's imposition of stipulated testimony by Sheriff's Deputy Karen Thomas violated his constitutional right of confrontation. Officer Thomas was ill at the time of trial and could not testify in person, and the defense and prosecution therefore attempted to agree on stipulated testimony for admission at trial.

79. The stipulation which was ultimately read to the jury contained ten paragraphs. Smith's attorneys stipulated to only the first eight of these and objected to introduction of paragraphs Nine and Ten. Smith argues that introduction of the two contested paragraphs deprived him of the right to cross examine the officer as to these two statements. Both the state supreme court and the state habeas court rejected this argument.

80. Prior to trial, the prosecution filed a motion in limine seeking to exclude any evidence that the victim, Younger, was allegedly involved in drug trafficking. One piece of evidence the State specifically sought to exclude was testimony by Officer Thomas that she had begun a case file documenting some alleged drug activity by

Younger. No case was ever pursued against him. [Record Proper (hereinafter, "RP"), at 184-186].

81. At a pretrial motions hearing, the State argued that Thomas really had nothing concrete to offer that would prove Younger was involved in drugs, and the evidence would be more prejudicial than probative. [Transcript of Pretrial Motions Hearing, September 11, 1995, at 24-25; hereinafter referred to in the format "PMH, at 24-25"]. Smith's attorney argued that the evidence supported the defense theory that the murder arose from a bad relationship between Lucero and Younger arising from a drug deal gone wrong, and that as such it went to the heart of the case and was not, as the prosecution would have it, "character in nature." [PMH, at 26]. The court indicated that to the extent Thomas could testify that she observed drug activity, and not merely provide hearsay, the evidence would be admissible. [PMH, at 27].

82. On day seven of the trial, the State's attorney notified the court that Officer Thomas, who was listed as a defense witness, was seriously ill with a condition that caused grand mal seizures which affected her memory. Counsel stated further that Thomas would testify that she had been investigating Younger shortly before his death on suspicion of drug dealing. She would say that she observed Younger in his identifiable white BMW in an area of South Broadway known for drug activity and that younger men came up to his car and talked to him on numerous occasions. [TR 7, at 94-96].

83. Toward the end of the State's case, the prosecution moved to exclude any testimony by Thomas, arguing the evidence was not relevant to defendants' attempts to link Younger with Frank Lucero to support the defense

position that Younger was killed not by defendants but by Lucero over a drug deal gone bad. At this point in the trial, the court stated that the testimony would not be allowed until an offer of proof had been made. [TR 7, at 94-96].

84. On day nine of the trial, Smith's attorney informed the court that the parties had agreed to enter into a stipulation as to what Officer Thomas' testimony would be if could have testified in person. He made an offer of proof, stating that Thomas would testify that while she was working as a narcotics detective in 1992, she observed a car matching the description of Younger's several times in an area of the South Broadway neighborhood. She saw a man in the car fitting Younger's description, observed young men approaching the vehicle, saw hands come in contact with the man, and based her professional experience, she thought the behavior was consistent with drug trafficking. [TR 9, at 1-4].

85. The State's position was that the Thomas testimony about her investigation into drug activity in the South Broadway area was irrelevant to this case, and fell under prior bad acts by the victim. The court ruled that the stipulation could be read to the jury, over objection by Smith's counsel that defendants specifically did not agree to the last two paragraphs of the ten-paragraph stipulation. The first eight paragraphs dealt with Thomas's observations regarding the South Broadway activity. The testimony as set forth in the final two paragraphs was to the effect that Thomas was unaware of any drug connection between Frank Lucero and Younger, and that she was unaware of a person named Frank Lucero the summer of 1992 when she observed this activity. The court ultimately ruled that the stipulation would be read to the jury but would not be allowed into the jury room, over objection by

Smith's counsel that the jury should be allowed to take it with them into deliberation. [TR 9, at 4-10; TR 10, at 1]. The full ten-paragraph stipulation was read to the jury. [TR 9, at 15-16].

86. On direct appeal, Smith argued that admission of the Thomas stipulation was error and violated his right to confrontation and cross examination. The Supreme Court found no error, noting that Thomas was a defense witness who would not be subject to cross examination by Defendants in any event, and it was Defendants who sought to have her testimony admitted and who agreed to the full stipulation in preference to forgoing her testimony altogether. The first eight paragraphs of the stipulation fit the defense theory of the case, the court said, and "We agree with State's contention that Defendants accepted paragraphs nine and ten of the stipulation in order to gain the first eight paragraphs of the stipulation." *State v. Smith, supra,* 126 N.M. at 347-348.

87. At the evidentiary hearing on the habeas petition, Smith's attorney acknowledged that the State had unsuccessfully attempted to keep the Thomas evidence out altogether. He stated that the parties had a phone conversation with Thomas during trial, in the judge's chambers and off the record, and that the stipulation as read to the jury accurately set forth what Thomas said in the phone conversation and that it represented the testimony she would have given if she had been able to appear in court. He acknowledged that the first eight paragraphs "really helped" the defense case in that they implied Younger's involvement in the drug trade. He said it was a tactical decision to allow admission of the entire stipulation, in order to get in the first eight paragraphs. However, he felt it was unfair and inaccurate for the trial judge to say to the jury

that the defense stipulated to the entire testimony, when it had not in fact stipulated to the last two paragraphs. [HC I, at 49-53; 62].

88. At the habeas hearing, one of the State's attorneys testified that the trial judge did not force Smith's counsel to accept the stipulation as it was eventually entered. He stated further that the State was not happy about the stipulation, either, as several points the State would like to have included were not allowed by the trial judge. In fact, he testified, he'd had "a bad feeling" about the stipulation because, "[w]e got two points in, they got eight points in," and he felt it was probably more damaging to the State than helpful. [HC II, at 39-41].

89. In its opinion rejecting this claim, the state habeas court noted that Smith agreed to the Thomas stipulation despite reservations about points 9 and 10, because the other eight paragraphs were important evidence presenting a link between Younger and illicit drug activity, and that it was clear that the final two paragraphs accurately represented what Thomas told the parties in the phone conversation. The habeas judge concluded that it was a tactical decision on the part of Smith's counsel to agree to the full ten-point stipulation and that Smith could not expect that he would be able to present the testimony without having the State bring out in the stipulation evidence that it would have elicited on cross examination. [Answer, Ex. R, at 8-9].

90. This Court cannot say that the two state court decisions were unreasonable. Smith argues that admission of the two final paragraphs "prejudiced Smith by undermining a significant part of his theory of defense" [Doc. 13, at 23], but this Court does not find that to be the case. Smith's attorney did in fact agree to allow the stipulation

into evidence because it contained information helpful to Smith's case which otherwise would not have been available. He relied on the helpful portion of Thomas' stipulated testimony in his closing argument. [TR 9, at 46]. It is clear that the defense accepted the two arguably detrimental paragraphs in exchange for the eight helpful ones, and that this was done as a matter of trial tactics. From a tactical and strategic standpoint, the agreement concerning the stipulation was far more helpful to the defense than to the State. Smith's Counsel stated at the habeas hearing that the defense team considered the risks and benefits and concluded it was more beneficial than harmful to have Thomas' testimony put before the jury, even if the stipulation was not all that the defense would have wanted.

91. It is true that counsel did not have the opportunity to cross examine Thomas as to the final two paragraphs. However, under the circumstances this does not constitute violation of his right to confront witnesses against him, as the witness was presented as part of the defendant's case and would not have been subject to defense cross examination. Even if this scenario had raised issues with regard to the confrontation clause, Smith waived this constitutional right by entering into the stipulation pursuant to a reasonable trial strategy. *Hawkins v. Hannigan,* 185 F.3d 1146, 1154-55 (10th Cir. 1999). Nor can the Court say that exclusion of the two paragraphs, wherein Thomas said she had no knowledge of Lucero and was not aware of any drug-related link between Lucero and Younger, would have changed the outcome. Smith's agreement to the stipulation did not preclude his arguing that this testimony did not mean that no such link existed, and it allowed him to argue in closing

that Younger was under surveillance as a drug trafficker, thus bolstering the defense theory of a drug deal gone wrong.

92. The Court sees no constitutional violation in the manner in which the Thomas stipulation was handled at trial.

Claim II C

Lucero Immunity Agreement as Violating Due Process Because Impermissibly Coercive

93. This claim is rejected for the reasons stated above under Claim I(B), wherein Court found reasonable the state courts' rulings rejecting Smith's claim that his counsel was ineffective for failing to move for suppression of the Lucero immunity agreement. The record demonstrates the agreement was not impermissibly coercive.

Claim II D

Restrictions on Lucero Cross-Examination and Other Methods of Discrediting him as Violating Smith's Confrontation and Due Process Rights

94. Smith next claims that his rights under the confrontation clause were violated when the trial court precluded him from cross examining Lucero about prior instances in which Lucero refused to take responsibility for his own behavior and attempted to exculpate himself when accused of criminal behavior. In addition, Smith includes under this heading three other claimed instances of constitutional violations involving the trial court's preclusion of evidence relating to Lucero's alleged prior drug-related activities. All of these claims go to Smith's allegation that he was unduly restricted in his efforts to

discredit Lucero, the only direct eyewitness to the murder who testified at trial. The issue involving prior arrests evidence was raised on direct appeal; the three other issues were raised only on state habeas review.

95. The primary argument under Claim II(D), and the one raised on direct appeal, is that Smith was deprived of the right to cross examine Lucero as to previous attempts to exculpate himself. Prior to trial, the State moved in limine to prohibit the introduction of Lucero's juvenile and adult arrest records. The motion stated that Lucero had been arrested three times. The first when Lucero, a freshman in high school at the time, was arrested for spraying a fire extinguisher into a creek bed. The second was a juvenile arrest in California for involvement in an incident of breaking into or damaging cars. Lucero claims he had nothing to do with the incident but was drunk and passed out at the time the vandalism occurred, and that his friends woke him up shortly before they were all arrested. The third incident was an adult arrest for receiving stolen property in 1989, six years prior to trial. Lucero says that this arrest came about because he was with another person who stole a jacket from a ski shop; he denied having prior knowledge of the theft or helping with it in any way. No charges were brought against Lucero in connection with this incident. [RP, at 178-80].

96. At the pretrial motions hearing, counsel for the State argued that the prior instances were merely arrests, not convictions, and that the defense wanted to introduce this evidence to show Lucero acted in this case in conformity with his prior behavior, a use prohibited by Evidence Rule 404(B). Smith's counsel countered that in each instance Lucero attempted to exculpate himself by claiming innocence and casting blame on others, that he was

doing the same thing in this case, and that the defense wanted to be able to point out to the jury this pattern of Lucero's behavior as probative of his veracity. [PM, at 1-3]. The motion to exclude this evidence was granted, on grounds its probative value was outweighed by the prejudicial effect. [PM, at 4].

97. During cross examination of Lucero at trial, Smith's counsel asked to clarify the record with regard to the court's ruling forbidding evidence of Lucero's prior arrest record. Counsel pointed out that this evidence tended to show Lucero's habitual response to allegations of wrongdoing against him, that is, is to cast blame onto others and paint himself as an innocent bystander. Counsel noted that on each of the three earlier occasions Lucero's stance was "consistent with his incredible position here in court that he was merely an innocent bystander to what he describes as a horrible crime." [TR 4, at 119-120]. The court reiterated its ruling excluding the evidence on Rule 403 grounds, further stating that the evidence was not permitted under Rule 404(B) or Rule 405. [TR 4, at 120].

98. On direct appeal, the state supreme court held that the trial court did not abuse its discretion in limiting cross examination as to Lucero's prior arrests. The court pointed out that Smith had ample opportunity to cross examine Lucero and did so vigorously on a variety of other issues, and therefore "Smith's argument that he was unable to test Lucero's credibility has no merit." *State v. Smith, supra,* 126 N.M. at 347.

99. Smith raised the issue again in his state habeas petition. [Answer, Ex. M, at ¶ II(5)]. The state habeas court did not specifically rule on this claim, although in

the order denying habeas relief the court noted that it had considered all the evidence and denied all claims for relief. [Answer, Ex. R, at 1]. This is sufficient to trigger the deference standard of 28 U.S.C § 2254(d), as the state court clearly rendered an adjudication on the merits of Smith's habeas petition. *Aycox v. Lytle,* 196 F.3d 1174, 1177-78 (10th Cir. 1999) (state court's summary, one-sentence habeas ruling was "on the merits" and therefore the federal habeas court "owe[s] deference to the state court's result, even if its reasoning is not expressly stated"); *Gipson v. Jordan, supra,* at 1196-97:

> a state court reaches a decision "on the merits" even when it fails either to mention the federal basis for the claim or cite any state or federal law in support of its conclusion . . . [and] we uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented.

Smith does not argue otherwise in his federal petition, and the Court will apply the deferential standard articulated in *Williams v. Taylor, supra,* to the state court's denial of his habeas petition.

100. The Court finds that there was nothing unreasonable in the state court's rejection of this claim. The record is clear that Smith's reason for seeking to introduce evidence of Lucero's prior arrest records was the very reason specifically prohibited in Rule 404(B), that is, to show prior instances of Lucero's conduct – that is, his tendency to claim innocent bystander status and to cast

the blame on others when accused of wrongdoing – to establish his character and show that he acted in conformity therewith in this case. In addition to Evidence Rule 404(B), Smith also relied on Rule 405(B) which allows evidence of specific instances of conduct in situations where a character trait of a person "is an essential element of a charge, claim or defense." Although the evidence could arguably have come in under this standard, the trial court specifically found that the probative value of the prior arrest evidence was outweighed by its prejudicial effect. The habeas court implicitly upheld this ruling as constitutionally reasonable, and this Court defers to that decision.

101. Although there might have been some minimal value to the defense in cross examining Lucero about his tendency to push the blame onto others, the stronger force of this evidence would have come from the fact that he was arrested three times in the past. These arrests – for possible involvement in vandalism and shoplifting, two of which occurred when he was juvenile – had nothing to do with the situation for which Smith and his co-defendant were on trial, and the ruling that prejudice outweighed probative value was well within the trial court's discretion. It did not unconstitutionally restrict Smith's right to cross examine Lucero. In addition, juvenile adjudications are "generally not admissible" for impeachment purposes, NMRA 11-609(D), and could have been excluded on this basis as well.

102. The "primary interest" secured by the constitution's confrontation clause is the right of the accused to cross examine witnesses against him. *Davis v. Alaska,* 415 U.S. 308, 315, 94 S. Ct. 1105, 1110 (1974).

> Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. The Confrontation Clause guarantees Mr. McCarty only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. [Internal punctuation omitted].

United States v. McCarty, 82 F.3d 943, 950 (10th Cir. 1996). The demands of the Confrontation Clause are satisfied where a defendant has the opportunity to reveal weaknesses in the witness' testimony. *United States v. McHorse,* 179 F.3d 889, 900 (10th Cir. 1999). The Court cannot say that exclusion of the prior arrest evidence urged by the defense in this case unfairly restricted Smith's ability to reveal weaknesses in Lucero's testimony.

103. As the state supreme court pointed out:

> Smith cross-examined Lucero on each aspect of his testimony. He questioned Lucero regarding his immunity agreement, his decision to tell his story to police, his choice of attorneys, his relationship with Younger and Defendants, and his decision to leave the state. Defendant Smith's argument that he was unable to test Lucero's credibility has no merit. We do not agree that the additional information regarding his previous arrests, none of which resulted in a conviction, would have substantially altered the cross-examination or the result of the trial.

State v. Smith, supra, 126 N.M. at 347. This Court agrees. The cross examination of Lucero was vigorous and wide-ranging,

and the Court cannot say that exclusion of the prior arrest evidence resulted in constitutional error.

104. Smith also raises three other asserted trial errors which he claims unfairly restricted his ability to cross examine Lucero and violated various of his constitutional rights, including: (1) refusal to permit Smith to cross examine Lucero regarding his past drug-related activities; (2) refusal to permit evidence of Lucero's use of intoxicants, including crack cocaine, during the time of the events about which he testified; and (3) refusal to give a limiting instruction about the testimony of an addict. As noted above, these issues were not raised on direct appeal. They were raised in Smith's state habeas petition and were implicitly rejected, although not mentioned specifically in the state court's order denying the petition. The Court applies the *Williams v. Taylor* deference standard to this denial.

105. Prior to trial, the State filed a motion in limine to prohibit introduction of evidence of Lucero's drug use. [RP, at 191-192]. At a pretrial motions hearing, the State offered the following facts in support of the motion: Lucero admitted to using cocaine, crack, LSD and marijuana in the past, but he was not convicted of any crimes involving these drugs. In addition, although the State conceded there was evidence that Lucero smoked crack cocaine on two occasions – once two and a half weeks prior to the homicide, the other approximately two or three weeks afterward – there was no evidence that Lucero was using illegal drugs on the day of the homicide. [PM at 6-9].

106. Smith's counsel argued at the pretrial motion hearing that the evidence that Lucero was smoking crack both before and after the day of the homicide indicated

that he was an addict and was under the influence of drugs on the day Younger was killed. He contended that Lucero's use of drugs was relevant to his ability to perceive accurately and supported the defense theory of a drug deal gone bad. The court excluded the evidence, excepting any use to show impairment in Lucero's ability to perceive. [PM, at 9-17].

107. On direct examination Lucero testified that, after the day he witnessed Smith murder Younger, his state of mind was "not very good at all." He said he couldn't sleep, had nightmares and was "getting drunk every day" in period shortly after the incident. He stated further that one reason he didn't go to the police about the incident was because he was "pretty much not capable of thinking" as he drank every day, to the point of passing out. [TR 3, at 134-145].

108. On cross examination, defense counsel was allowed to ask Lucero whether he was smoking crack during the period after the homicide. He stated that he had tried it "a couple of times" prior to the incident, and didn't recall whether he'd used it after the incident. He denied ever selling or trafficking in crack cocaine. [TR 4, at 23, 93]. Defense counsel attempted to question Lucero as to whether he'd ever "transferred" cocaine from one person to another. The Court the court sustained the State's objection to this question. [TR 4, at 94-96].

109. At trial, Norma testified that she was dating Frank Lucero in the fall of 1992 and that he lived with her for a short time after the Younger murder. Smith's counsel attempted to elicit from her on cross examination the fact, that she and Lucero got high on crack cocaine on October 1, 1992. The court sustained the State's objection holding

that Lucero's drug use, two weeks after the date of the homicide, was irrelevant. [TR 5, at 165-166].

110. Lucero's cousin Denise Purcell, and Matilda Gonzales, were called by the defense. They both testified that Lucero came to Purcell's house shortly after the murder, saying he needed a place to stay because he was running from the cops. Both women testified that Lucero told them he murdered Younger because he owed Younger money for drugs. [TR 8, at 109-112; 143-145].

111. Smith's attorney asked the court to give an instruction on how to judge credibility of a witness shown to be a user of addictive drugs. [TR 9, at 12]. The court rejected this request, finding that the general uniform jury instruction on credibility was sufficient to cover all matters raised by the parties. [TR 9, at 13].

112. Smith's attorney used the evidence of Lucero's drug activity in closing argument, challenging Lucero's credibility on many grounds including his admitted abuse of alcohol and crack cocaine, and he suggested to the jury that Lucero was the actual murderer who killed Younger over a drug debt gone bad. [TR 9, at 41, 48].

113. Smith's complaints about the trial court's evidentiary rulings excluding some details of Lucero's past drug use and possible trafficking activity, are not sufficient to justify habeas relief. "[I]t is not the province of a federal habeas court to reexamine the state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 480 (1991).

> [On federal habeas review,] [t]he New Mexico state courts' evidentiary and procedural rulings may not be questioned unless [petitioner] demonstrates that the . . . [ruling] was so prejudicial in the context of the proceedings as a whole that he was deprived of the fundamental fairness essential to the concept of due process.

Nichols v. Sullivan, 867 F.2d 1250, 1253 (10th Cir. 1989).

114. Smith has not met this burden. The trial court ruled that evidence that Lucero was abusing drugs on the day of the killing would be admitted to show impairment in his ability to perceive the events on which he gave eyewitness testimony. However, no evidence was produced to show such impairment. The jury was allowed to hear that Lucero was a substantial alcohol abuser, at least in the period following the homicide, and that he used crack cocaine on two occasions, once before the murder and once afterward. There was no proffer of any evidence, aside from the implication arising from Lucero's admitted use of crack cocaine on two occasions, that he was addicted to the drug or was impaired by crack or other substances on the day of the killing.

115. Smith argues that he was unfairly, unconstitutionally restricted in his ability to show that Lucero was involved in drug trafficking, a fact which would support the theory that Lucero, not Smith, killed Younger. The Court does not agree. Defendants were allowed to present evidence that Lucero told two people he killed Younger because he owed him money on a drug deal, that Lucero abused alcohol and used crack cocaine on two occasions, that he was seen with a person who may have matched the description of Younger, and that Younger may have been involved in drug trafficking. In addition, the defense had

the opportunity, and used it vigorously, to attack Lucero's credibility on a variety of grounds. The defense also commented on Lucero's substance abuse in closing argument. In the context of the trial as a whole, the trial judge's rulings with regard to evidence of Lucero's drug activity did not render the trial unfair or violate due process.

116. Smith also complains that the trial court refused to give a cautionary instruction regarding testimony of an addict. He has, however, failed to make the requisite showing that the court's action rendered the trial fundamentally unfair.

> In a habeas proceeding attacking a state court judgment based on an erroneous jury instruction, a petitioner has a great burden. A state conviction may only be set aside in a habeas proceeding on the basis of erroneous jury instructions when the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial. . . . The question in this proceeding is not whether the instruction is undesirable, erroneous, or even universally condemned, but whether the instruction so infected the trial that the resulting conviction violates due process. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law. [Internal punctuation and citations omitted].

Maes v. Thomas, 46 F.3d 979, 984 (10th Cir. 1995).

117. It is true that determination of Lucero's credibility was inevitably a crucial factor in the jury's deliberation, as he was one of only two witnesses who testified at trial of their firsthand knowledge of the events surrounding the

Younger death, and there was no blood, fingerprint, or other physical evidence linking Smith to the killing. However, the Court cannot say that failure to give a non-standard instruction, which essentially added a gloss to the credibility instruction given, "so infected the trial that the resulting conviction violates due process." Lucero's version of events on the day of the homicide was supported by the testimony of other witnesses, including most notably Denise Spikes and Norma Ruiz. The defense team vigorously attacked the credibility of Frank Lucero, through cross examination and evidence of his behavior and statements with regard to the killing. There was some evidence that he abused alcohol and drugs, if not as much as the defense would have wanted, and they were able to use this at trial and argue it to the jury in closing.

118. In sum, Smith has not shown that the evidentiary rulings surrounding the Lucero testimony, and the refusal to give a cautionary instruction on the testimony of an addict, rendered the trial fundamentally unfair and amounted to a denial of due process. Habeas relief is not available on these claims.

Claim II E
Supreme Court's Use of a Different Theory of Admissibility to Uphold an Evidentiary Ruling as Violation of Due Process

119. Smith argues that the state supreme court violated his right to due process in upholding, under a different theory than that advanced at trial, the admission of certain evidence. He contends that the testimony of Linda Satomba as to statements made by Lucero describing Smith's involvement in the Younger murder was inadmissible, either as substantive evidence under the

"prior consistent statement" hearsay exclusion of Rule 801(D)(1)(b), or as rehabilitation after Lucero had been attacked on cross examination. As discussed above under Claim I(A), the supreme court held that the statements should not have been admitted under Rule 801, but that they were admissible as rehabilitation evidence. *State v. Smith, supra,* 126 N.M. at 348-352.

120. Smith argues that this holding by the supreme court violated his right to due process, because the statements were offered by the prosecution at trial for their truth, the trial court admitted them on that basis, and the prosecution argued in closing that the statements were substantive evidence of Smith's guilt. Smith says it was fundamentally unfair for the supreme court to uphold admission of the evidence on a theory that the State did not assert at trial since, if the evidence were meant only for rehabilitation, Smith would have been entitled to an instruction that the jury could consider the statements for that purpose only.

121. Smith presented this argument to the state supreme court in a motion for rehearing, filed after the supreme court's decision. [Answer, Exs. G, H]. The State filed a response, and both parties had an opportunity to brief the issue fully. The New Mexico Supreme Court denied the motion for rehearing without comment. [Answer, Ex. J]. Smith raised the issue again in his state habeas petition. The district judge rejected this ground for habeas relief, holding that the State "properly argued Lucero's prior consistent statements to rehabilitate him" and the supreme court's ruling was not constitutionally unfair. [Answer, Ex. R, at 3-4].

122. This Court cannot say that the state courts acted unreasonably, on the motion for rehearing and on the petition for habeas corpus, in rejecting Smith's argument that the supreme court's decision was "fundamentally unfair." There was sufficient legal basis for the supreme court to rule that the testimony was proper as rehabilitation evidence, after Lucero's credibility was attacked on cross examination. The court based its ruling on the fact that, at common law, prior consistent statements were admissible for rehabilitation on several theories, and there is no indication that the U.S. Supreme Court's decision in *Tome v. United States, supra* (discussed above under Claim I(A)) was meant to eliminate these bases.

123. The state supreme court noted that the defense attacked Lucero's credibility by suggesting on cross examination that his in-court testimony was inconsistent in certain particulars with his statements to his aunt, thus triggering the State's right, at common law, to introduce the complete statement Lucero made to Satomba, in order to rebut these suggestions. In addition, on cross examination Lucero denied telling his cousin that he killed Younger. When the defense brought on the cousin to testify to these statements, the court said, the State then had the right to introduce Lucero's prior consistent statement to his aunt, in order to bolster Lucero's denial of making the prior inconsistent statement to his cousin. Given its reasoning and the authority cited in support, this Court cannot say that the state supreme court was unreasonable in holding the Satomba testimony admissible to rehabilitate Lucero.

124. Although the evidence was admitted at trial as non-hearsay under Rule 801, the prosecution did not

unduly emphasize Satomba's testimony in closing argument. Indeed, that testimony was mentioned only briefly, the prosecutor noting primarily that Lucero's statements to Satomba were consistent with his testimony on the stand. [TR 9, 22-23]. The Court cannot say that the State argued to the jury that Satomba's testimony constituted substantive evidence of Smith's guilt. The state habeas court explicitly found that the State did not do so. It is true there was no limiting instruction, but as noted above in the discussion of Claim I(A), the Court cannot say that the lack of a limiting instruction under these circumstances changed the outcome of the trial or rendered it fundamentally unfair. Habeas relief is not warranted on this claim.

Claim II F

Failure to Give Lesser Included Offense Instruction

125. Smith argues that the trial court's refusal to give an instruction on the lesser included offense of voluntary manslaughter violated his due process rights. This issue was raised on direct appeal. The state supreme court held there was no view of the evidence under which voluntary manslaughter could be the highest degree of crime committed, in that no evidence was adduced to show the defendants killed Younger after being sufficiently provoked. *See,* N.M.S.A. 1978 § 30-2-3 (voluntary manslaughter statute); N.M.U.J.I. 14-222 (defining sufficient provocation). 126. A state court's ruling on a lesser included offense instruction subject to federal habeas review only in rare cases.

> The Supreme Court has never recognized a federal constitutional right to a lesser included offense instruction in non-capital cases, *see Beck v.*

> *Alabama,* 447 U.S. 625, 638 n.14, 100 S. Ct. 2382 (1980), and neither has this court. Our precedents establish a rule of "automatic non-reviewability" for claims based on a state court's failure, in a non-capital case, to give a lesser included offense instruction.

Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004). In explaining the reason for this rule, the Seventh Circuit commented:

> To transform the federal courts in the exercise of their habeas corpus jurisdiction from enforcers of specific constitutional rights to guarantors of the accuracy of state court determinations of guilt would enmesh the federal judiciary in almost every detail of state criminal procedure and every trial ruling, and we would regularly have to review failures to instruct on lesser included offenses under state law as well as decide other issues unrelated to a specific federal constitutional safeguard. We shall decline this task until directed to take it up by our judicial superiors.

Nichols v. Gagnon, 710 F.2d 1267, 1272 (7th Cir. 1983).

127. It is only the rare occasion, when the trial court's refusal to instruct on lesser included offense amounts to "fundamental unfairness," which would warrant federal habeas relief. *Chavez v. Kerby,* 848 F.2d 1101, 1103 n.1 (10th Cir. 1988); *Nichols v. Gagnon, supra,* at 1269, 1272 (habeas review of failure to instruct on lesser included offense will only be undertaken to correct a "fundamental miscarriage of justice," as when denial of the instruction was likely to have resulted in conviction of an innocent person).

128. This is not a case implicating such "fundamental unfairness" or "fundamental miscarriage of justice." There was sufficient evidence adduced at trial to support the jury's finding that Smith murdered Younger, and that he planned well in advance and enlisted the aid of others to do. The only evidence of provocation – Younger's anger at the fact that Smith physically abused Denise Spikes – was minimal and was countered by other evidence to the effect that Younger walked calmly into room where he was murdered and that he was not carrying any weapons. There was no evidence that he was excited, agitated, or behaved in a threatening manner as he approached the room. In addition, the trial record reveals that Smith's primary defense theory was that Younger's killer was actually Lucero, who murdered him over a drug debt, and that Smith and his co-defendant had no part in it. Under all of these circumstances, the Court concludes that the refusal to give a lesser-included instruction did not amount to a miscarriage of justice. Habeas relief is not warranted on this claim.

Claim II G
Cumulative Error

129. The Court rejects petitioner's argument that cumulative error by the trial court rendered the trial unfair. A cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors. *Brecheen v. Reynolds*, 41 F.3d 1343, 1370 n.23 (10th Cir. 1994). No errors having been established, there is no basis for inquiring into the cumulative effect.

Recommended Disposition

That Respondent's Motion to Dismiss [Doc. 10] be granted and the Petition for Writ of Habeas Corpus be denied, and the case be dismissed with prejudice.

/s/ Lorenzo F. Garcia
Lorenzo F. Garcia
Chief United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TYRONE SMITH,

Petitioner,

vs.

CIVIL NO.
04-261 MCA/LFG

DONALD DORSEY, Warden,
Western New Mexico
Correctional Facility,

Respondent.

ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDED DISPOSITION AND DISMISSING ACTION WITH PREJUDICE

(Filed Dec. 21, 2004)

THIS MATTER came before the Court on the Magistrate Judge's Findings and Recommended Disposition, filed November 18, 2004 [Doc. 16], and on Petitioner's objections to the findings and recommended disposition, filed December 1, 2004 [Doc 17]. The Court conducted a *de novo* review of those portions of the Magistrate Judge's findings and recommended disposition to which Petitioner objects. The objections raise no new arguments.

IT IS HEREBY ORDERED that the findings and recommended disposition of the United States Magistrate Judge are adopted by the Court.

IT IS FURTHER ORDERED that Respondent's Motion to Dismiss [Doc. 10] is granted, the petition is denied and this action be, and it hereby is, dismissed with prejudice.

/s/ M. Christina Armijo 12-21-2004
UNITED STATES DISTRICT JUDGE

THE SUPREME COURT OF THE
STATE OF NEW MEXICO
August 25, 2003

NO. 28,185

TYRONE SMITH,

Petitioner,

vs.

JOE WILLIAMS, Warden,

Respondent.

Bernalillo
District Court
(CR-94-1321)

ORDER

This matter coming on for consideration by the court upon Petition for Writ of Certiorari filed pursuant to Rule 12-501 of the Rules of Appellate Procedure, and the court having considered said petition and response, and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chavez concurring;

NOW, THEREFORE, IT IS ORDERED that the Petition for Writ of Certiorari is denied.

IT IS SO ORDERED.

ATTEST: A TRUE COPY

/s/ Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

(SEAL)

WITNESS, The Hon. Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 25th day of August, 2003.

/s/ Madeline Garcia
Madeline Garcia,
Chief Deputy

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CR-94-1321/Smith
CR 94-1322/Brown

TYRONE SMITH and
MATTHEW BROWN,

Petitioners,

vs.

JOE R. WILLIAMS, Warden
Lea County Correction Center,

Respondent.

ORDER DENYING PETITIONERS' RELIEF REQUESTED PURSUANT TO THE HABEAS CORPUS PETITIONS FILED IN SAID CASE

(Filed Jun. 19, 2003)

THIS MATTER comes to the Court's attention as a result of an Evidentiary Hearing and argument on Petitioner's Writs for Habeas Corpus arguing ineffective assistance of counsel and other claims of error. The Court having considered all of the evidence denies Petitioners' request for relief. The Court makes the following Findings of Fact and Conclusions of Law to support its order:

I. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING LUCERO'S PRIOR CONSISTENT STATEMENTS DENIED: Claims I(1) and II(7)

A. FINDINGS OF FACT

1. At the trial of this case, the prosecution elicited Frank Lucero's prior out of court's statements during the

testimony of Linda Satomba. These out of court statements contained Lucero's

* * *

upon, request gives a limiting instruction. The absence of a request for a limiting instruction and the Supreme Court's ultimate determination that the state properly argued Lucero's prior consistent statements to rehabilitate him was neither unconstitutionally "unfair" to petitioners not the result of ineffective assistance of counsel.

13. It was not deficient for Petitioners' counsel to not anticipate rehabilitative use of Lucero's prior consistent statements, nor to ask for a limiting instruction.

14. Petitioners have failed to show ineffective assistance of counsel or that in any way they were deprived of their rights of due process and therefore Claims I(1) and II(7) are denied.

II. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING THE IMMUNITY AGREEMENT DENIED: Claims I(2) and II(4)

A. FINDINGS OF FACT

1. Lucero testified as an eyewitness to the murder of Jerol Younger and to the involvement of Smith and Brown after he entered in to an agreement giving him transactional immunity.

2. The first condition of the immunity agreement required Lucero to "give complete and truthful statements of all facts known to him regarding the murder of Jerol Younger Jr."

3. At trial Lucero testified that the immunity agreement required him to testify to the true facts, and truthfully, and that he would be subject to prosecution if he did not testify truthfully.

4. During cross-examination Lucero was questioned in full and effectively about the theory that he was influenced or coerced by the immunity agreement and that because of it he testified untruthfully.

5. The New Mexico Supreme Court held that the immunity agreement was not coercive and that Defendants "cannot realistically" contend that Lucero was compelled by the State to testify to any particular version of the facts.

6. At the habeas corpus hearing, Petitioner Smith's counsel, Kennedy, testified he was aware of controlling precedent in this area and that he believed that a motion to suppress Lucero's testimony based on the coercive nature of the agreement would have failed.

7. Petitioner Brown's attorney, Cooper, drafted a motion to suppress Lucero's testimony based on the idea that the agreement was coercive but decided not to file it because she felt it was without merit.

B. CONCLUSIONS OF LAW

1. The prosecutor did not intend to compel Lucero to testify other than truthfully and Lucero understood he as to testify truthfully.

2. The Supreme Court correctly concluded that the testimony was not inherently unreliable and that Lucero's credibility was properly left to the jury.

3. The Supreme Court correctly concluded that the immunity agreement was not coercive.

4. There was no evidence presented at the habeas corpus evidentiary hearing to demonstrate that permitting Lucero to testify under this non-coercive immunity agreement denied petitioners a fair trial.

5. There is no reasonable possibility that had petitioners' counsel moved to suppress Lucero's testimony based on the agreement being coercive, that motion would have succeeded.

6. Petitioners fail to show ineffective assistance of counsel in regard to this claim or that they were in any way denied a fair trial or due process and for this reason their Claims I(2) and Claim II(4) are denied.

III. INEFFECTIVE ASSISTANCE REGARDING SPIKES' PRIOR CONSISTENT STATEMENTS DENIED: Claim I(4)

A. FINDINGS OF FACT

1. The trial court allowed Theresa Jiminez and Constance O'Grady to testify about prior consistent statements made by Denise Spikes.

2. The New Mexico Supreme Court held that Spikes' motive to lie arose in January 1993 when she was questioned by police, while her prior consistent statements were made to Jimines in 1992, making the testimony by Jimines admissible under the pre-motive rule of *Tome*.

3. The Supreme Court found that some of what Spikes told O'Grady occurred in 1994, after a motive to lie arose, and was inadmissible under the pre-motive rule of *Tome,*

but this error by the trial court was harmless since "Grady's testimony was cumulative of admissible testimony by Jimines regarding similar, pre-motive prior consistent statements made to her by Spikes.

4. Witnesses including Spikes, Jimines, and Tolbert gave conflicting pretrial accounts, some of which indicated that Spikes may have indicated soon after Younger's murder that she would need an alibi for the time of the murder.

5. Counsel considered submitting these statements at the trial court when arguing against the admission of Spikes' prior consistent statements on the theory that perhaps the court would find her motive to lie arose earlier.

6. Counsel made the tactical decision that the overall effect of bringing these witness statements before the court would be extremely prejudicial to their case and was not at all helpful regarding any attempt toe establish an earlier motive to lie by Spikes.

B. CONCLUSIONS OF LAW

1. Counsel considered and rejected the statement of Spikes. Tolbert and Jimines in arguing that Spikes motive to lie arose prior to January 1993.

2. Reasonably competent attorneys would have concluded that there was greater potential for damage in presenting this evidence than in using the existing evidence to establish when Spikes' motive to lie arose.

3. The Court should not second guess the strategy and tactics of defense counsel.

4. Spikes testimony placing petitioners at the scene with the victim was unaffected by any findings as to when her motive to lie arose and could not have been excluded no matter when the court found such motive to have arisen.

5. Spikes most damaging prior statements were admissible as a co-conspirator's statements.

6. Petitioners failed to demonstrate that counsel was incompetent by failing to present statements by other witnesses to try to place Spikes' motive to lie earlier than January 1993 or that they were prejudiced because such an effort would have effected the outcome of trial and therefore petitioners' claim I(4) is denied.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL REGARDING SPIKES' PRIOR INCONSISTENT STATEMENTS DENIED: Claim I(5)

A. FINDINGS OF FACT

1. The trial court admitted testimony by Constance O'Grady and Theresa Jimines of prior inconsistent statements made by Spikes.

2. Counsel did not make an objection under Rule 403 at trial to this testimony.

3. The New Mexico Supreme Court held that this testimony was properly admitted under the existing evidence rule.

4. The Supreme Court also rejected Petitioners' claim that the State called Spikes solely to impeach her with inconsistent statements, since in addition Spies gave substantial consistent testimony which materially advanced the State's case.,

5. At the habeas evidentiary hearing, defense counsel testified that a Rule 403 objection would not have succeeded in getting this testimony suppressed since prior inconsistent statements by Spikes were more probative than prejudicial.

B. CONCLUSIONS OF LAW

1. A reasonably competent attorney would have decided not to object under Rule 403 to testimony of Spikes' prior inconsistent statements since such objections would have been overruled.

2. Petitioners failed to demonstrate that either a reasonably competent attorney would have made a Rule 403 objection or that such an objection would have effected the outcome of trial and therefore petitioners' Claim I(5) is denied.

V. PETITIONERS RIGHT OF CONFRONTATION BY ADMISSION OF KAREN THOMAS STIPULATION WAS NOT DENTED: Claim II(2)

A. FINDINGS OF FACT

1. Petitioners sought to call as a trial witness Karen Thomas but she was gravely ill.

2. A phone conversation was had with Thomas with all parties present in the Judge's chambers. After this conversation and substantial argument by the parties, the trial court ruled that petitioners were able to call Thomas. Her testimony would be essentially what was stated in a ten-point stipulation by the parties.

3. Petitioners agreed to the Thomas stipulation despite reservations about points nine and ten because points one through eight were important evidence to present a link between the victim Younger and the dealing of illegal drugs.

4. The trial court ruled that the stipulation could be read to the jury but not entered as an exhibit.

5. The New Mexico Supreme Court held that petitioners agreed to the Thomas stipulation despite reservations about points nine and ten because points one through eight were important to the defense theory of the case and would have been testified to by Thomas on cross-examination had she been called to testify.

6. It was a tactical decision to get some favorable evidence admitted along with points nine and ten instead of having to forego any evidence from the unavailable defense witness, Karen Thomas.

7. At the habeas corpus evidentiary hearing it was clear that Thomas did say that she would have testified to what became paragraphs nine and ten of the stipulation in addition to her other testimony.

B. CONCLUSIONS OF LAW

1. Petitioners agreed to the full ten-point stipulation as a tactical decision.

2. Petitioners sought to have Thomas' testimony admitted in the trail rather than to forego having her testimony at all.

3. Petitioners could not expect that they would be able to present Thomas' testimony in the form of a stipulation

without the State bringing out in the stipulation evidence that would have been submitted during cross-examination.

4. Petitioners failed to demonstrate any denial of confrontation or any other constitutional right in the trial court's admission of Thomas' stipulation and therefore petitioners' Claim II(2) is denied.

VI. PETITIONERS CLAIM OF A BRADY VIOLATION IS DENIED: Claim II(1)

A. FINDINGS OF FACT

1. At trial Smith's attorneys asked the court to order the prosecutors to produce investigation files about the two deaths which counsel had read in the newspaper.

2. Counsel interviewed the lead investigating officer, Detective Broihier, who stated there were no leads linking these deaths to Younger's murder.

3. The trial court refused to order disclosure of files on these unrelated cases.

4. The New Mexico Supreme Court held that the only basis for attempting to compel disclosure of internal police investigatory files on these two deaths was the reading of news accounts and that therefore the trial court properly denied disclosure.

5. The Supreme Court ruled that there were insufficient facts to establish a due process violation.

6. At the time of the habeas corpus evidentiary hearing, Petitioner possessed no additional information to that presented to the trial court which would justify the disclosure of these investigatory files.

B. CONCLUSIONS OF LAW

1. To establish a due process violation petitioners must demonstrate that the prosecution suppressed material evidence which was directly exculpatory to petitioners.

2. There is no *Brady v. Maryland,* 373 US. 83, 87 (1973) violation if the prosecutor refuses to disclose unrelated investigative reports about other suspects who were never charged in the murder of which the petitioners are accused.

3. Petitioners presented nothing additional to warrant a finding other than that entered by the New Mexico Supreme Court on direct appeal in which they ruled there was no *Brady* violation and no grounds for further inquiry in this area and therefore petitioners' Claim II(1) is denied.

VII. PETITIONERS CLAIM OF CUMULATIVE ERROR IS NOT APPLICABLE AND THEREFORE DENIED: Claim II(10).

/s/ W. John Brennan
W. JOHN BRENNAN,
District Court Judge

APPROVED:

/s/ Terri Keller
TERRI KELLER
ASSISTANT DISTRICT ATTORNEY

/s/ Telephonic approval as to form
JOHN CLINE
DEFENSE COUNSEL

[Telephonically approved as to
form by Leonard Foster Defense Counsel]

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I hereby certify that a copy of
this instrument was delivered to

DA, PD, Att gen. Def

this 30th day of June, 2003

JC

Sent J. Cline 7-9-03
Def 7-9-03

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

Opinion Number: _____
Filing Date: _____

Docket No. 23,674

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

MATT BROWN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
W. John Brennan, District Judge

Lamberton & Riedel
Hilary Lamberton
Santa Fe, NM

for Appellant

Hon. Tom Udall, Attorney General
Arthur W. Pepin, Assistant Attorney General
Santa Fe, NM

for Appellee

CONSOLIDATED WITH

Docket No. 23,748

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

TYRONE SMITH,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
W. John Brennan, District Judge

Freedman, Boyd, Daniels, Hollander, Goldberg & Cline, P.A.
John D. Cline
Albuquerque, NM

for Appellant

Hon. Tom Udall, Attorney General
Arthur W. Pepin, Assistant Attorney General
Santa Fe, NM

for Appellee

OPINION

(Filed Sep. 16, 1998)

MINZNER, J.

{1} A jury convicted co-defendants Tyrone Smith and Matt Brown of first degree murder in violation of NMSA 1978, § 30-2-1(A)(1) (1994), conspiracy to commit first degree murder in violation of NMSA 1978, § 30-28-2(B)(1) (1979), and tampering with evidence in violation of NMSA 1978, § 30-22-5 (1963). They appeal these convictions to this Court claiming the trial court erred in several critical areas.

{2} Defendants argue that the trial court erred in its refusal to instruct the jury on the lesser included offense of voluntary manslaughter; that this cause should be remanded for a hearing pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963); that the trial court erred when it admitted the testimony of three witnesses as evidence of prior consistent statements; that the trial court erred in admitting the testimony of the two main prosecution witnesses,

because the immunity agreement with one witness was impermissibly coercive and the trial court lacked authority to immunize the other witness; that the court erred in the admission of stipulated testimony; that the jury should have been cautioned regarding accomplice testimony; and that the testimony of witnesses regarding their fear of Defendants was inadmissible hearsay. Because these arguments overlap, we consolidate the two appeals.

{3} We conclude the trial court did not commit reversible error in admitting any testimony purported to be hearsay and that the trial court properly admitted the testimony of the two main prosecution witnesses. We also conclude that the trial court did not err in permitting various witnesses to testify regarding their fear of Defendants. We address these and other issues in greater detail in the following opinion. For the reasons stated below, we affirm.

I. FACTS

{4} On September 14, 1992, the body of Jerol Younger, an Air Force sergeant stationed at Kirtland Air Force base, was found in an irrigation ditch in south Albuquerque. He had been strangled and beaten to death. Younger allegedly was a drug dealer in Albuquerque up until the time of his death.

{5} Denise Spikes and Frank Lucero were the two main prosecution witnesses. The stories they told provided the theory of the State's case. Spikes testified as follows.

{6} She and Younger had been married at one time and had a son together. Spikes testified that Younger disliked the intimate relationship that had developed between Spikes and Defendant Smith. According to Spikes, Defendant

Smith and Spikes decided to resolve the relationship with Younger by going to talk to him. Spikes called Younger from a pay phone in Albuquerque and asked him to come and get her. The two drove to Lucero's house, a small, free-standing room in Albuquerque's South Valley, where Defendants and Lucero were waiting. When Spikes knocked on the door, Younger was grabbed and taken into the house, and Spikes remained outside. She testified she heard Younger scream and she ran to a nearby pay phone. Defendant Smith, however, came to get her, apparently before she was able to phone for help. When she arrived back at Lucero's house, Younger was gone, as was his car. Defendant Smith went into the house for a few minutes, came out, and he and Spikes went to his mother's home. Several weeks later, Spikes asked Defendant Smith if he had killed Younger and he denied it.

{7} Lucero, who was in the room at the time of the killing, testified as follows. He said that he was at his girlfriend's house when Defendant Smith came to the door and said that he needed to go to Lucero's house because someone was going to pick up a television. Lucero testified that he got into a Blazer belonging to Defendant Smith's mother, in which Spikes and Defendants were seated. They drove to Lucero's house and entered. Lucero testified that Defendant Smith and Spikes left, and Defendant Smith returned alone with a television, which he placed in the closet. Lucero stated that he heard a car drive up, and heard two voices; he recognized one as the voice of Spikes, and the other as male. The man entered, and Defendant Smith told the man that the television was in the closet. When he went to the closet, Defendants attacked the man with hammers. Lucero testified that Spikes was walking in at the time, but that the door must have closed on her.

Lucero testified that Defendant Brown retrieved a gun from a bag and held it on the man while Defendant Smith tied him. Defendant Smith then told Lucero to put on gloves, take the man's car keys, and get rid of the car. Lucero did so. Afterwards, Defendant Smith found Lucero and brought him back to his house. The man was still on the floor at Lucero's home. The three men loaded the body into a truck and dumped his body in a ditch.

{8} Following the murder, Lucero became very anxious around police officers. According to Lucero's cousin, Denise Purcell-Abeyta, and her roommate, Matilda Gonzales, Lucero admitted to killing Younger because he owed Younger money for drugs. Shortly after this, police attempted to search Lucero's home, but it had been burned down. In the remains of the house, however, the police found a hammer head and handle, plastic bags, duct tape, and cords similar to those used to tie up Younger. Around the time of the search, both Lucero and Defendant Smith left the state and traveled to San Diego to visit Spikes.

{9} In San Diego, Lucero stayed with his aunt, Linda Satomba. When police located Satomba, she initially denied knowing his whereabouts. Later, though, she told police Lucero had related to her a story similar to his trial testimony. According to Satomba, Lucero never admitted to killing Younger. Satomba testified at trial regarding Lucero's statements. Her testimony was admitted under the prior consistent statement rule.

{10} Lucero was given transactional immunity and Spikes was given use immunity to testify at trial. Defendants were convicted of first degree deliberate intent murder, conspiracy to commit first degree murder, and two

counts of evidence tampering. They were sentenced to life imprisonment plus twelve years.

{11} Defendants argue that the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter and that the State should have been forced to produce evidence of allegedly related crimes. Defendants additionally argue that the trial court erred in admitting Lucero's and Spikes' testimony. They contend that Lucero's out-of-court statements to Satomba, and Spikes' out-of-court statements to Constance O'Grady and Theresa Jimenes were inadmissible hearsay. They also contend that the court should have given the jury a cautionary instruction regarding the testimony of immunized accomplices; that Lucero's immunity agreement violated Defendants' due process rights because it was impermissibly coercive; and that the court did not have the authority to immunize Spikes. We discuss each of these contentions in turn.

II. VOLUNTARY MANSLAUGHTER INSTRUCTION

{12} Defendants claim that they were entitled to have the jury instructed on voluntary manslaughter. In order to obtain an instruction on a lesser included offense, "[t]here must be some view of the evidence pursuant to which the lesser offense is the highest degree of crime committed, and that view must be reasonable." *State v. Curley,* 1997-NMCA-038, ¶ 5, 123 N.M. 295, 939 P.2d 1103.

{13} In this case, there must be some view of the evidence that Defendants killed after being sufficiently provoked. UJI 14-220 NMRA 1998. Defendants argue that Spikes' and Jimenes' testimony that Spikes had been abused by Younger during their relationship, and Spikes'

testimony that Younger was jealous of her relationship with Smith raise an inference that Defendants acted in response to sufficient provocation. Spikes testified that Defendant Smith physically abused her on two occasions shortly before the murder, and she informed Younger of this abuse after he noticed marks on her neck while driving to Lucero's house on the day of the murder. Defendants allege that Spikes' testimony that Younger was upset by the marks on her neck and angry for this reason at Defendant Smith also support an inference of provocation. The evidence does not support such an inference. *See* UJI 14-222 NMRA 1998 (defining provocation, in part, as "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other *extreme emotions*" affecting defendant's "ability to reason" and causing a "loss of self control.") (emphasis added). At most, the testimony on which Defendants rely demonstrates their awareness of Younger's potential for violence; however, the evidence regarding the way in which the attack took place shows absolutely no provocation. Lucero testified that Younger was grabbed and beaten after going to a closet to get a television set. Spikes testified that she saw Younger yanked into Lucero's room. No evidence was adduced at trial to support an inference of sufficient provocation. Defendants were not entitled to an instruction on voluntary manslaughter.

III. PRODUCTION OF EVIDENCE

{14} Defendant Smith claims that the prosecution withheld potentially exculpatory evidence, which should have been disclosed under *Brady,* 373 U.S. at 87. Our rule requires that the state disclose any evidence "favorable to the defendant which the state is required to produce under

the due process clause of the United States Constitution." Rule 5-501(A)(6) NMRA 1998. Defendant Smith sought police investigation records about the deaths of two women, one of whom was found gagged and bound as was Younger. Because these deaths apparently occurred within days of Younger's murder, Smith sought to show that the murders might be linked.

{15} "A defendant's motion for production must be based upon facts, not conclusions, or mere surmise and conjecture, and a blanket request will not be granted, because the defendant has no right to examine the state's evidence merely in the hope that something will turn up to aid him." *State v. Tackett,* 78 N.M. 450, 453-54, 432 P.2d 415, 418-19 (1967) (citations omitted). Defendant Smith heard of the deaths, which he surmised might be linked, through the newspapers. He had no other basis for requesting the police files on these other cases. We hold that this is not enough to establish a due process violation. "[O]nly if there is a reasonable *probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" should a court remand for a *Brady* hearing. *People v. Memro,* 905 P.2d 1305, 1330 (Cal. 1995) (en banc) (citations and quotation marks omitted) (emphasis added), *cert. denied,* 117 S.Ct. 106 (1996). There may have been a facial resemblance between the way the body of Younger and that of the other victim had been found, but that resemblance is not enough to show that it was probable that the result of the trial would have been different had the evidence been disclosed.

IV. ACCOMPLICE-RELATED EVIDENCE

{16} Defendants' remaining points of error largely concern the admissibility, credibility and weight of the accomplice testimony of Lucero and Spikes. Although not expressly articulated, we believe these claims essentially center around the question of whether Lucero's and Spikes' testimony constituted sufficient evidence to sustain a conviction. Therefore, we will discuss each of these claims in turn, followed by a general analysis of whether these claims, in combination, rise to the level of a due process violation.

A. Issues related to Lucero's testimony

1. Lucero's immunity agreement was not impermissibly coercive.

{17} Defendants concede that they failed to object at trial to the admission of Lucero's testimony on the grounds that the immunity agreement was impermissibly coercive and therefore violated Defendants' due process rights. Because Defendants failed to preserve this question for review, we will reverse on this issue only if the question of guilt is so doubtful that to affirm the conviction would shock the conscience. *State v. Osborne,* 111 N.M. 654, 662, 808 P.2d 624, 632 (1991).

{18} "[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." *People v. Medina,* 116 Cal.Rptr. 133, 145 (Ct. App. 1974), *quoted in part in State v. Zinn,* 106 N.M. 544, 548, 746 P.2d 650, 654 (1987). "[T]he primary purpose of excluding coerced testimony of

third parties is to assure the reliability of the trial proceedings. . . ." *People v. Badgett,* 895 P.2d 877, 886 (Cal. 1995) (en banc). "[T]he burden of proving improper coercion is upon the defendant." *Id.* at 887.

{19} In New Mexico, we have said that an immunity agreement must not require the accomplice to return a conviction or testify in a certain fashion. *Zinn,* 106 N.M. at 548, 746 P.2d at 654. "[T]he principal requirement for the validity of an immunity agreement is that the accomplice testify truthfully; likewise, absent an agreement that induces an accomplice to testify in a certain fashion, the testimony of an accomplice goes to credibility, not to admissibility." *Id.* (citation omitted).

{20} The agreement in this case required Lucero to "give complete and truthful statements of all facts known to him regarding the murder of [Jerol Younger] as represented by his attorney and set forth in paragraphs 1 through 11 [of the agreement]." Defendants argue that this required Lucero to testify in conformity with the facts as the State understood them through their investigation and his attorney's representations. While it is possible to interpret this language as Defendants argue – that is, as compelling Lucero to testify to a particular story, whether truthful or not – the record supports a conclusion that the prosecutor did not intend to compel Lucero to testify other than truthfully and that Lucero understood he was to testify truthfully.

a.

{21} First, Lucero stated on direct examination that he understood that his agreement was to tell the truth:

Q: Tell us what your understanding of the immunity agreement is.

A: It [sic] I come forth, cooperate, tell the truth to the best of my knowledge, basically cooperate and – basically just tell the truth to the best of my knowledge.

Q: If you tell the truth to the best of your knowledge, is it your understanding that no charges are going to be brought against you?

A: Correct.

This line of questioning indicates that both the State and Lucero understood that his only obligation under the agreement was to be truthful and cooperative. Additionally, counsel for Smith elicited an affirmative response from Lucero on the following question on cross-examination: "Meaning [by transactional immunity] that for the whole incident, you have no exposure, as long as you testify truthfully and do whatever they say, right?" Finally, counsel for Defendant Brown stated in closing arguments that Lucero's "a man given total immunity from prosecution. *All he has to do is tell you the truth.* But what he does is give you two or three versions of what occurred." (Emphasis added.) Under such circumstances, Defendants cannot realistically contend that Lucero was compelled by the State to testify to any particular version of facts. Lucero's prior consistent statement to Satomba, made absent any governmental influence, supports the conclusion that Lucero's testimony was not sufficiently unreliable to deny Defendants a fair trial.

b.

{22} The California Supreme Court, the opinions of which this Court cited with approval in *Zinn,* has allowed the testimony of accomplice witnesses under similar circumstances. In *People v. DeSantis,* 831 P.2d 1210, 1220-21 (Cal. 1992) (en banc), an accomplice, Masse, testified against the defendant after Masse's own conviction and sentencing in the hope of being resentenced to a lighter sentence. The defendant objected to Masse's testifying prior to any resentencing resulting from his agreement with the State. *Id.* In affirming the district court's decision to allow the testimony, the Court stated,

> Notwithstanding defendant's efforts to portray the agreement as impermissibly tainted because Masse asserted that he expected to have to testify in conformity with his prior statement, the record elsewhere establishes that Masse meant by his assertion that his testimony at trial would have to conform to that given in his tape-recorded statement because both were true. Masse declared repeatedly that his duty under the agreement was to be truthful and give a complete account of the facts, and that if he did so the sentencing court might reduce his sentence. That was also his interviewers' understanding. . . . In sum, though the bargain obviously contained "a . . . degree of compulsion [of the type] inherent in any plea agreement or grant of immunity," [*People v. Morris,* 807 P.2d 949 (Cal. 1991)], from Masse's perspective the degree of compulsion was not overwhelming, and more important, the only demand Masse understood the agreement made of him was to tell the truth. Such a bargain did not make the trial

> fundamentally unfair, and hence did not offend defendant's due process rights.

Id. at 1221.

{23} Similarly, in *Badgett,* the accomplice received a letter from the prosecution giving her immunity "should she testify under oath to these same statements." *Badgett,* 895 P.2d at 894 (emphasis omitted). The Court concluded that "these same statements" merely referred to new testimony and not that she remain consistent. *Id.* at 895. More importantly for this case, however, the Court determined that, even if the statement created such a condition, "the consistency requirement did not continue in effect. At the ensuing preliminary hearings, there was no further mention of the consistency requirement when the immunity agreement was discussed." *Id.* at 896. In fact, in the trial court, the witness "testified repeatedly that her understanding of her immunity agreement was that she would get immunity for the juvenile charges formerly pending against her if she would agree to testify truthfully in court." *Id.* at 895.

> If the immunity agreement in this case had conditioned [the accomplice's] immunity on an understanding that she would testify at trial consistently with her previous statements to the police, we would conclude that the trial court erred in rejecting the defense motion to exclude her testimony. Our review of the record, however, persuades us that although, as defendants claim, there was some mention of consistency in the initial understanding with respect to immunity at [the accomplice's] juvenile court detention hearing, the agreement under which she actually testified did not contain such a condition. It is the

> latter agreement, of course, that is determinative of defendants' claim.

Id. at 893.

c.

{24} Lucero understood the agreement to require him only to tell the truth. Defendants did not elicit anything to the contrary on cross-examination. In fact, it appears that Defendants' counsel understood the agreement in a similar manner at trial. Further, Defendants objected to the introduction of the agreement into evidence. Thus, any lack of information the jury may have had to weigh the credibility of Lucero for purposes of coercion resulted from Defendants' actions. We conclude that this testimony was not inherently unreliable, that Lucero's credibility was properly left to the jury, and that the immunity agreement was not coercive. *See, e.g., People v. Deltejo,* 560 N.Y.S.2d 778, 779 (App. Div. 1990). Therefore, the admission of Lucero's testimony does not amount to fundamental error.

2. The trial court did not err in refusing to admit Lucero's prior arrests.

{25} Defendant Smith argues that the trial court erred in not allowing him to cross-examine Lucero regarding prior arrests; specifically, Smith argues he should have been allowed to question Lucero about his attempts to exculpate himself from the criminal conduct for which he was arrested. "[T]he standard of review for limitations on cross-examination is abuse of discretion." *State v. Brown,* 1997-NMSC-029, ¶ 18, 123 N.M. 413, 941 P.2d 494, *cert. denied,* 118 S.Ct. 426 (1997). We are not persuaded that the trial court abused its discretion here.

{26} Smith asked the trial court to admit evidence of Lucero's two juvenile arrests and one adult arrest, arguing that the arrests and Lucero's response to them were admissible under Rule 11-404(B) NMRA 1998 and Rule 11-405(B) NMRA 1998. Smith further argued that Lucero responded to each of his arrests by blaming others for the criminal act, just as he was doing here, and therefore, he had a pattern of exculpating himself by pointing the blame at others. The trial court disagreed, finding that the prejudicial effect outweighed the probative value.

{27} On appeal, Smith contends that the court prevented him from conducting effective cross-examination. We disagree. Smith cross-examined Lucero on each aspect of his testimony. He questioned Lucero regarding his immunity agreement, his decision to tell his story to police, his choice of attorneys, his relationship with Younger and Defendants, and his decision to leave the state. Defendant Smith's argument that he was unable to test Lucero's credibility has no merit. We do not agree that the additional information regarding his previous arrests, none of which resulted in a conviction, would have substantially altered the cross-examination or the result of the trial.

3. The trial court did not err in accepting stipulated testimony.

{28} Defendants claim the trial court erred in admitting two paragraphs of a stipulation to which they objected. Karen Thomas, who was an undercover narcotics investigator for Bernalillo County at the time of Younger's murder, was unavailable at the time of trial due to illness. Therefore, the State and the defense, who sought Thomas' testimony as part of their defense, agreed to a stipulation regarding the content of her testimony. The defense stated,

"[W]e *agreed* to enter into a stipulation with the Government as to what her testimony would have been had she been here." (Emphasis added). Defendants noted for the record aspects of Thomas' testimony that the court would not allow into the trial. The court then asked, "With that understanding, [were] the State and Defendant – objection still on the record – able to come to a stipulation as to what Ms. Thomas' testimony would be with those caveats?" Defense counsel acknowledged that they had agreed on a ten point stipulation, stating that they did not agree to paragraphs nine and ten of the stipulation, which the court noted. Those two points were that Thomas could not connect Younger and Lucero and was unaware of a person named Frank Lucero during her undercover narcotics investigation.

{29} This Court has held that a stipulation by defense counsel to the contents of a deposition is not admissible at trial when it violates the defendant's right to confrontation and cross-examination. *Millican v. State,* 91 N.M. 792, 793, 581 P.2d 1287, 1288 (1978). In *Millican,* defense counsel did not stipulate to the truthfulness of the deponent's statements, but rather stipulated that the deponent had made the statements. *Id.* at 792, 581 P.2d at 1287. Millican was unable to cross-examine effectively or otherwise challenge the deponent's statement. *Id.* at 793, 581 P.2d at 1288. We held that this violated his sixth amendment rights, and reversed and remanded for a new trial. *Id. Millican* does not control this case. The witness in question was a defense witness, who would not be subject to cross-examination by Defendants.[1]

[1] We do note that *Millican* conflicts with other states' approaches to this issue. Other courts have held that "when evidence is offered by way of stipulation, there is no agreement as to the facts which the

(Continued on following page)

{30} We conclude no error occurred in this case. Defendants *sought* to have Thomas' testimony admitted into the trial rather than forgo having her testimony at all. Defendants cannot expect that they would be able to present Thomas' testimony in the form of a stipulation without the State bringing out in the stipulation how they would expect Thomas to testify on cross-examination. We agree with the State's contention that Defendants accepted paragraphs nine and ten of the stipulation in order to gain the first eight paragraphs of the stipulation.

4. The trial court properly admitted Lucero's prior consistent statement to Satomba.

{31} At trial, Satomba testified about Lucero's statement to her regarding the murder. The State argues that her testimony was admissible under the prior consistent statement rule. Rule 11-801(D)(1)(b) NMRA 1998. An out-of-court statement made by a witness who testifies at trial is not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Rule 11-801(D)(1)(b). The statement must be made before a motive to fabricate arises. "[O]nly those statements made before the motive originated are nonhearsay and therefore admissible."

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evidence seeks to establish. Such a stipulation only goes to the content of the testimony of a particular witness if he or she were to appear and testify. The agreement is to what the evidence will be, not to what the facts are." *Barnes v. State*, 354 A.2d 499, 505 (Md. Ct. Spec. App. 1976). "A stipulation of evidence is not an agreement that the evidence or testimony is admissible or that the testimony is truthful." *Mosquera v. State*, 877 S.W.2d 40, 42 (Tx. Ct. App. 1994, no pet.).

Casaus, 1996-NMCA-031, ¶ 18; *accord Salazar,* 1997-NMSC-044, ¶ 66.

{32} Defendants contend that Lucero's motive to falsify arose before he told Satomba what happened and, therefore, under *Tome v. United States,* 513 U.S. 150 (1995), and *State v. Casaus,* 1996-NMCA-031, 121 N.M. 481, 913 P.2d 669, the testimony should not have been admitted. We review the admission of evidence under an abuse of discretion standard and will reverse only if its admission is against logic and is "'clearly untenable or not justified by reason.'" *See State v. Apodaca,* 118 N.M. 762, 770, 887 P.2d 756, 764 (1994) (quoting *State v. Litteral,* 110 N.M. 138, 141, 793 P.2d 268, 271 (1990)). The question of when a motive to lie arises is a question the trial court answers, reviewable by an appellate court under the abuse of discretion standard. *State v. Salazar,* 1997-NMSC-044, ¶ 65, 123 N.M. 778, 945 P.2d 996.

{33} At trial, when Defendants cross-examined Lucero, they pursued two different lines of questioning to establish that Lucero had the motive to lie prior to the statement he made to Satomba. First, Defendants questioned whether Lucero lied to protect himself from prosecution and gain an immunity deal. Defendants asked Lucero in cross-examination, "And, in order to avoid that time [in jail], you made this deal with . . . the District Attorney's Office, right? . . . [T]his is what's called the immunity, right?" Defendants then asked Lucero about the details of the murder and implied that he was directly involved in the murder:

> Q: You've never veered from your position that you're an innocent bystander to the death of Jerol Younger, right?

A: No.

Q: Why is it that you need immunity?

A: Because I drove the BMW, and I also drove the car for them to dispose of the body.

Q: Well, you were innocent, though, right? You didn't do anything wrong?

{34} The State introduced Satomba's testimony that Lucero had told her the same story he told at trial in order to rebut Defendants' implication that Lucero lied to protect himself. Defendants objected to the introduction of this evidence, arguing that Lucero had a motive to fabricate. Defendants argued at trial that, despite their cross-examination challenging Lucero's credibility, his statements to Satomba should not have been admitted since he had a motive to lie in 1992, before he told Satomba his story. In a bench conference, Defendants argued that "the motive to fabricate arises at the time of the witness[']s, Lucero[']s participation in the murder." However, the court responded, "I'm finding, based on the cross-examination done by both [of] you . . . that you attempted to show that the basis for him being – or the motive for him giving testimony here could be to take advantage of the offer of the State." Therefore, the court found Lucero's motive arose in 1994, when he was in protective custody in California, facing murder charges.

a.

{35} Defendants argue that Lucero's actions in 1992 indicate his motive to lie. According to defense witnesses Denise Purcell-Abeyta and Matilda Gonzales, he began hiding from the police in 1992, and acted strangely from

then forward. The State responds that his actions are explainable; they argue his actions arose from fear of those who committed the murder, or fear of being held responsible for a murder he did not commit.

{36} The State argues that to follow Defendants' argument would be to eliminate the admission of any prior consistent statements. It may be argued that a declarant whom a defendant accuses of being involved in the crime and who witnesses that crime may possess a motive to fabricate as soon as the crime takes place because he or she fears prosecution. We cannot so conclude without eviscerating the rule. While we recognize that a declarant may have a motive to lie immediately following the crime, due to the declarant's involvement in the crime, failure to report the crime, and fear of prosecution, such a conclusion must necessarily be a fact-based inquiry. The mere witnessing of a crime does not give rise to a presumption or conclusion that a motive to fabricate existed at the time of the crime. A defendant must elicit more concrete testimony from the declarant to establish a motive to lie.

{37} Here, Defendants have elicited testimony from a witness regarding Lucero's actions immediately following the murder, in 1992. Purcell-Abeyta testified that, in 1992, Lucero came to her and asked to stay with her because he was in trouble. After she questioned him regarding the "trouble," he said he killed Younger, to whom he owed money. She also testified that Lucero became fearful of the police at this time. In addition, in October of 1992, the police searched his home in Albuquerque, where they found a hammerhead, plastic garbage bags, duct tape, and cords, all of which could have been used in the murder of Younger. Defendants argue that this evidence, adduced at trial, showed that Lucero had a powerful motive to lie

because of his involvement in the murder and the police suspicion that had begun to focus on him. We agree.

{38} Lucero allegedly admitted he committed the crime in 1992, he became fearful of the police and sought to hide from them, and police began to suspect his involvement and searched the remains of his home. This evidence demonstrated that he had a motive to lie – to protect himself – in October of 1992. This pre-dated his arrival in California, where he stayed with Satomba, by nearly one year. He told Satomba the story he told at trial several days after his arrival. Satomba's testimony would not have been admissible under *Casaus* as substantive evidence because she heard the statements after Lucero's motive to lie arose. However, we conclude that Satomba's testimony was properly admitted as rehabilitative evidence.

b.

{39} To hold that the trial court abused its discretion in admitting Satomba's testimony regarding Lucero's story, this Court must find that the trial court "acted in an 'obviously erroneous, arbitrary or unwarranted manner.'" *State v. Stills,* 1998-NMSC-009, ¶ 33, 957 P.2d 51 (quoting *State v. Alberico,* 116 N.M. 156, 170, 861 P.2d 192, 206 (1993)). We hold that the trial court did not abuse its discretion when it admitted Satomba's testimony because of other testimony offered at trial.

{40} In *Tome,* the United States Supreme Court focused on the admission of prior consistent statements pursuant to Rule 801(d) of the Federal Rules of Evidence. *Tome,* 513 U.S. at 156. The Court "intimate[d] no view . . . concerning the admissibility of any of [the declarant's] out-of-court statements under [Rule 803(24)], or any other evidentiary

principle." *Id.* at 166. Additionally, the Court stated that its "holding is confined to the requirements for admission under Rule 801(d)(1)(B)." *Id.* at 167.

{41} The Fourth Circuit has relied on this language from *Tome* to distinguish the introduction of prior consistent statements for purposes of rehabilitation, as opposed to use as substantive evidence. *United States v. Ellis,* 121 F.3d 908, 920 n.16 (4th Cir. 1997), *cert. denied,* 118 S.Ct. 738 (1998). Because Rule 801(d) identifies certain out-of-court statements that are admissible to prove the truth of the matter asserted, in other words, for substantive purposes, the Fourth Circuit reasoned that Rule 801(d) and the United States Supreme Court opinion in *Tome* do not control the introduction of prior consistent statements for the sole purpose of rehabilitating a witness. *Id.* at 919-21.

{42} The Fourth Circuit's interpretation is fairly consistent with the overall reasoning of *Tome,* though there is dicta in *Tome* indicating that the majority had a different understanding of Rule 801(d)(1)(B) than the Fourth Circuit. The United States Supreme Court relied heavily on two sources of authority in its interpretation of Rule 801(d)(1)(B): (1) the common law; and (2) the advisory notes for the Federal Rules of Evidence. *Tome,* 513 U.S. at 159-60. The Court determined that the premotive requirement existed at common law and that the rules committee intended to adopt the common law understanding of prior consistent statements. *Id.* at 160. "The Notes disclose a purpose to adhere to the common law in the application of evidentiary principles, absent express provisions to the contrary." *Id.* The Court noted that the advisory notes did not reveal a purpose to "scuttle" the common law premotive requirement. *Id.* at 161-62.

{43} At common law, prior consistent statements were admissible for rehabilitation on several theories: (1) to place a supposed inconsistent statement in context to refute the alleged inconsistency; (2) to support the denial of making an inconsistent statement; (3) to refute the suggestion that the witness's memory is flawed due to the passage of time; and (4) to refute an allegation of recent fabrication, improper influence, or motive. *See United States v. Rubin,* 609 F.2d 51, 67-69 (2d Cir. 1979) (Friendly, J., concurring), *aff'd,* 449 U.S. 424 (1981); *see also Kellam v. Thomas,* 287 So.2d 733, 734-35 (Fla. Dist. Ct. App. 1974). As Justice Breyer noted in his dissent, Rule 801(d) deals only with the fourth theory on which prior consistent statements may be offered. *Tome,* 513 U.S. at 170 (Breyer, J., dissenting).

{44} There is language in *Tome* that suggests that Rule 801(d)(1)(B) is the only source for the admission of prior consistent statements in the Federal Rules of Evidence. For example, the Court stated that "the question is whether [declarant's] out-of-court statements rebutted the alleged link between her desire to be with her mother and her testimony, not whether they suggested that [declarant's] in-court testimony was true. The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." *Tome,* 513 U.S. at 157-58. In addition, the Court opined that "[i]f Rule 801 were read so that the charge opened the floodgates to any prior consistent statement that satisfied Rule 403, as the Tenth Circuit concluded, the distinction between rejected Uniform Rule 63(1) [allowing any out-of-court statement if the declarant testifies and is subject to cross-examination] and Rule 801(d)(1)(B) would all but disappear." *Tome,* 513 U.S. at 162. These statements could be interpreted to mean

that the United States Supreme Court interpreted Rule 801 of the Federal Rules of Evidence as the sole means of admitting prior consistent statements and that even rehabilitative uses must comply with Rule 801 and the premotive requirement. However, we do not believe that *Tome* should be interpreted so broadly or that our Rules of Evidence should be interpreted so narrowly.

{45} First, we construe these statements in *Tome* as dicta because, as the majority in *Tome* noted, the actual use of the evidence in *Tome* was substantive rather than rehabilitative. 513 U.S. at 165 ("At closing argument before the jury, the Government placed great reliance on the prior statements for substantive purposes but did not once seek to use them to rebut the impact of the alleged motive."). Additionally, the advisory notes indicate that the Federal Rules altered the common law by allowing the use of prior consistent statements offered under the fourth theory, to refute a charge of recent fabrication, as substantive evidence. Thus, the advisory committee appears not to have rejected the common law approach to prior consistent statements but, rather, to have broadened the use of prior consistent statements admissible at common law. As the majority in *Tome* reasoned, "'[w]ith this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely [the common-law requirement].'" *Tome,* 513 U.S. at 161 (quoting *United States v. Abel,* 469 U.S. 45, 50 (1984)). Therefore, we think it is highly unlikely that the drafters intended to "scuttle" three of the four theories under which prior consistent statements were admissible at common law without expressly so indicating. Rather, we believe that prior consistent statements continue to be admissible on these theories *for purposes of rehabilitation,* consistent

with the common law, and subject to principles of relevancy and undue prejudice pursuant to Rules 401, 402, and 403. Further, this interpretation is consistent with the traditional understanding of hearsay; the rehabilitative use of the statements does not purport to offer the words for the truth of the matter asserted but, instead, to refute a specific attack against the witness's credibility. *See* Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule,* 24 Fla. St. U. L. Rev. 509, 539 (1997). It appears that this interpretation is consistent with all of the Federal Circuit Courts of Appeals which have addressed the issue, *see id.,* except for the Ninth Circuit, which has precedent holding the opposite, *United States v. Miller,* 874 F.2d 1255, 1273 (9th Cir. 1989), but which currently appears undecided on the matter in the wake of *Tome, United States v. Collicott,* 92 F.3d 973, 982 n.11 (9th Cir. 1996). Our interpretation of *Tome* is also consistent with a recent opinion of the Maryland Court of Appeals. *See Holmes v. State,* 712 A.2d 554, 560 (Md. 1998) ("We believe that *Tome* left open the question of whether a prior consistent statement may be admissible for other rehabilitating purposes."). Notwithstanding our interpretation of *Tome,* we believe our Rules of Evidence incorporated the common law rule regarding prior consistent statements. Therefore, we conclude that Rule 11-801 does not prohibit certain limited rehabilitative uses of prior consistent statements.

{46} In this case, Defendants attacked Lucero's credibility on two grounds which allow admission of the prior consistent statement. First, counsel for Defendant Smith suggested on cross-examination of Lucero that Lucero's in-court testimony was inconsistent with his statements to his aunt. At common law, the State would be permitted to

introduce the complete statement to his aunt to rebut the suggestion that it was inconsistent, as well as under the doctrine of completeness. *See, e.g., Ellis,* 121 F.3d at 920-21; *cf. Holmes,* 712 A.2d at 559-60 (permitting use of prior consistent statement to rebut impeachment through prior inconsistent statement). Second, counsel for Defendant Smith asked Lucero on cross-examination whether he had admitted killing Younger to his cousin, Denise Purcell-Abeyta, and another woman, Matilda Gonzales; Lucero denied making the admission. Defendants then called Purcell-Abeyta and Gonzales to the witness stand to relate Lucero's alleged admission. At common law, the State could introduce Lucero's consistent statement to Satomba in order to bolster Lucero's denial of making the prior inconsistent statement to Purcell-Abeyta and Gonzales. *See, e.g., State v. Franco,* 365 A.2d 807, 812 & n.5 (Me. 1976); *Brown v. Pointer,* 212 N.W.2d 201, 203-04 (Mich. 1973). Thus, we conclude it was not error for the district court to admit the prior consistent statement for purposes of rehabilitation.

B. Issues related to Spikes' testimony

1. The trial court did not commit reversible error in admitting Spikes' prior consistent statements.

{47} We next examine the trial court's decision to admit evidence of Spikes' prior consistent statements to O'Grady. Defendants argue that O'Grady's testimony regarding Spikes' story about the night of the murder should not have been admitted as prior consistent statements. According to O'Grady, Spikes told her that she and Smith had driven to Albuquerque from San Diego to "work out" their relationship with Younger, that she called Younger

and he drove her to Lucero's home, and that he was pulled into the room and she remained outside. She told O'Grady this information in 1994. Defendants argue that the motive for Spikes to lie arose immediately after the murder. The State contends that the motive to lie arose in January, 1993, when she was questioned by police regarding her involvement in the murder. We agree that under *Casaus,* O'Grady's testimony, to the extent she discussed Spikes' statements to her in 1994, was inadmissible. However, O'Grady testified to information that Spikes also gave Jimenes.

{48} Spikes told Jimenes similar information to that told to O'Grady. We agree with the State that Spikes' motive to lie arose in 1993, when she was questioned by police regarding the murder. She told Jimenes a similar story shortly after the murder occurred, before being questioned by police. Under the prior consistent statement rule, the testimony was correctly admitted because the motive to lie had not yet arisen. The trial court did not err in admitting Jimenes' testimony.

{49} In view of Jimenes' testimony, O'Grady's testimony about the 1994 conversation was cumulative. Although the trial court erred in admitting O'Grady's testimony about the 1994 conversation, the error was harmless. *See State v. Woodward,* 121 N.M. 1, 10, 908 P.2d 231, 240 (1995) ("The erroneous admission of cumulative evidence is harmless error because it does not prejudice the defendant.").

2. The trial court did not err in admitting Spikes' prior inconsistent statements.

{50} Defendants also argue that the trial court abused its discretion in admitting testimony by O'Grady and Jimenes

about Spikes' prior inconsistent statements. In 1995, the prior inconsistent statement rule was amended to admit only prior inconsistent statements made under oath: "A statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial . . . or other proceeding. . . ." Rule 11-801(D)(1)(a). However, at the time this case was filed, a prior inconsistent statement could be admitted whether it was made under oath or not. *See State v. Baca,* 120 N.M. 383, 391-92, 902 P.2d 65, 73-74 (1995) (noting that amendment requiring prior inconsistent statement to have been made under oath does not apply to defendant whose case was filed prior to effective date); *Mason v. Duckworth,* 74 F.3d 815, 818 (7th Cir. 1996) (holding that, because a change in the Indiana rules of evidence requiring out-of-court statements to have been made under oath in order to be admissible is not one of constitutional proportions, defendant is not entitled to have new rule applied retroactively). The record reflects that Spikes had made contradictory statements. For example, at trial, Spikes denied that Defendant Smith asked her to help kill Younger in order to receive his insurance money. Both O'Grady and Jimenes testified that Spikes had told them, individually, that Defendant Smith had asked her to do so. Under the prior-inconsistent-statement rule in 1994, these statements were not hearsay. *See Woodward,* 121 N.M. at 7, 908 P.2d at 237.

{51} Defendants also argue that the trial court erred in admitting testimony by O'Grady and Jimenes of inconsistent statements by Spikes, because "'impeachment by prior inconsistent statement may not be permitted where

employed as a mere subterfuge to get before the jury evidence not otherwise admissible.'" *United States v. Zackson,* 12 F.3d 1178, 1184 (2d Cir. 1993) (quoting *United States v. Morlang,* 531 F.2d 183, 190 (4th Cir. 1975)). The State suggests the principle does not apply because it is intended to limit a party from calling a witness primarily to impeach that witness with otherwise inadmissible evidence; that, in this case, the record supports a conclusion that Spikes gave favorable as well as unfavorable testimony. *See generally Morton v. State,* 689 So.2d 259, 262-64 (Fla. 1997) (discussing limitations on the use of prior inconsistent statements to impeach one's own witness).

{52} We think the principle on which Defendants rely has broader application than the State has conceded. In *Morton,* the Florida Supreme Court summarized the most general principles and emphasized the trial court's broad discretion to balance the probative value of particular impeachment testimony against its prejudicial effect.

> Obviously, no single rule can be delineated to cover all of the circumstances under which parties will seek to impeach their own witnesses. Generally, however, if a party knowingly calls a witness for the primary purpose of introducing a prior statement which otherwise would be inadmissible, impeachment should ordinarily be excluded. On the other hand, a party may always impeach its witness if the witness gives affirmatively harmful testimony. In a case where a witness gives both favorable and unfavorable testimony, the party calling the witness should usually be permitted to impeach the witness with a prior inconsistent statement. Of course, the statement should be truly inconsistent, and

> caution should be exercised in permitting impeachment of a witness who has given favorable testimony but simply fails to recall every detail unless the witness appears to be fabricating. In addressing these issues, trial judges must have broad discretion in determining whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice or confusion.

Id. at 264.

{53} Under these principles, because Spikes gave both favorable and unfavorable testimony, the prosecution was entitled to offer evidence of any prior inconsistent statements, which the trial court might have been asked to exclude under Rule 11-403, NMRA 1998. In this case, however, neither Defendant made a sufficiently specific objection to alert the trial court to the need to balance the probative value of the testimony in impeaching Spikes against the prejudicial effect of the particular prior inconsistent statements to which O'Grady and Jimenes testified.

{54} Defendant Brown asked the court to exclude O'Grady as a witness on the ground Spikes' motive to lie arose at the time of the murder, and Spikes' conversation with O'Grady occurred in June, 1994. That is a different objection than the argument made on appeal that the prosecution improperly impeached its own witness.

{55} Defendant Smith argued that O'Grady's testimony was not proper either as showing prior consistent statements or prior inconsistent statements, because the testimony was a "means of improper bolstering." He characterized the State's theory and method of trial as "contrived." Defendant Smith made an initial hearsay

objection to Jimenes' testimony, as she began to describe statements to her by Spikes. He subsequently asked for a continuing objection and then, again asking for a continuing objection, indicated that he had the same objections to Jimenes' testimony that he had articulated in objecting to O'Grady's testimony.

{56} Smith's objections more closely track the argument made on appeal, but they do not distinguish between inconsistent and consistent statements and thus did not indicate that balancing under Rule 11-403 was required of the trial court. We conclude the particular error argued on appeal was not preserved at trial. Rule 12-216 NMRA 1998. The objections made invoked a ruling on the general, preliminary questions of whether Spikes had made a consistent statement prior to trial that pre-dated a motive to lie and whether she had made statements prior to trial that were inconsistent with her trial testimony. We do not think the trial court erred in identifying statements Spikes made to O'Grady and Jimenes as inconsistent with her trial testimony. We conclude the more specific argument on appeal was not preserved at trial, and on that basis conclude Defendants have shown no error in the trial court's rulings.

3. The trial court properly granted use immunity to Spikes.

{57} Defendant Smith argues that the district court did not have the authority to immunize Spikes from prosecution and to compel her to testify. Specifically, Smith argues that the statute authorizing immunity, NMSA 1978, § 31-6-15 (1978), applies only to grand jury proceedings and not to court proceedings. We agree that Section 31-6-15 is

limited to grand jury proceedings. *See State v. Summerall,* 105 N.M. 82, 83, 728 P.2d 833, 834 (1986). However, Section 31-6-15 is not the sole source of authority for the district court's actions. Rule 5-116 NMRA 1998[2] and Rule 11-412 NMRA 1998[3] apply to court proceedings and, if valid, permit the district court to conditionally compel testimony. Smith argues that these rules merely implement Section 31-6-15 and, therefore, do not expand judicial authority to immunize testimony beyond the grand jury context. Smith relies on *Apodaca v. Viramontes,* 53 N.M. 514, 212 P.2d 425 (1949), for the proposition that the principle of separation of powers contained in Article III,

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[2] Rule 5-116 states:

> A. *Issuance of order.* If a person has been or may be called to testify . . . in an official proceeding conducted under the authority of a court or grand jury, the district court for the judicial district in which the official proceeding is or may be held may, upon the written application of the prosecuting attorney, issue a written order requiring the person to testify . . . notwithstanding his [or her] privilege against self-incrimination.
>
> B. *Application.* The court may grant the application and issue a written order pursuant to this rule if it finds:
>
> (1) the testimony . . . may be necessary to the public interest; and
>
> (2) the person has refused or is likely to refuse to testify . . . on the basis of his [or her] privilege against self-incrimination.

[3] Rule 11-412 states:

> Evidence compelled under an order requiring testimony . . . notwithstanding a privilege against self-incrimination, or any information directly or indirectly derived from such evidence, may not be used against the person compelled to testify . . . in any criminal case, except a prosecution for perjury committed in the course of the testimony or in a contempt proceeding for failure to comply with the order.

Section 1 of the New Mexico Constitution requires statutory authority for grants of immunity. Smith argues that, to apply Rule 5-116 to court proceedings, we must overrule *Apodaca* and that, in doing so, we would overlook the role of the judiciary in our constitutional scheme of government. We disagree. We hold that the district court properly relied on valid rules of this Court in compelling Spikes' testimony.

a.

{58} In order to explain our holding on this issue, it is necessary to distinguish between two separate forms of governmental immunity. Transactional immunity describes an agreement by the government not to prosecute an individual for particular crimes in exchange for testimony or information. *See Piccirillo v. New York,* 400 U.S. 548, 568-69 (1971) (Brennan, J., dissenting). By contrast, use or derivative use immunity describes an agreement not to utilize particular testimony, as well as evidence gathered as a result of the testimony, in a future prosecution of the witness. *See State v. Vallejos,* 118 N.M. 572, 576, 883 P.2d 1269, 1273 (1994). Thus, with respect to use immunity, there is no expectation on the witness's part that the State will refrain from prosecuting the witness for crimes related to the witness's testimony.

{59} It is clearly within the province of the Legislature to establish procedures for granting transactional immunity to a prosecution witness. *Apodaca,* 53 N.M. at 518-25, 212 P.2d at 427-31; *see State v. Thoreen,* 91 N.M. 624, 627, 578 P.2d 325, 328 (Ct. App. 1978) (calling into question, based on separation of powers and *Apodaca,* an earlier version of

Rule 5-116 which provided for immunity from prosecution). *But see Campos v. State,* 91 N.M. 745, 747, 580 P.2d 966, 968 (1978) (implicitly approving the version of Rule 5-116 questioned in *Thoreen*). Transactional immunity represents the Legislature's decision to suspend the application of its laws against particular classes of individuals, such as those assisting in the prosecution of others. *See Brown v. Walker,* 161 U.S. 591, 601-02 (1896). As a result, transactional immunity clearly falls within the Legislature's amnesty power. *See Apodaca,* 53 N.M. at 521, 212 P.2d at 429; *see also Brown,* 161 U.S. at 601.[4] Thus, this Court held in *Apodaca* that district attorneys and courts are without power to grant immunity from prosecution "[a]bsent an enabling statute." 53 N.M. at 523, 212 P.2d at 430.

{60} Nonetheless, we do not believe that *Apodaca* is controlling in this case. Unlike transactional immunity (the type of immunity at issue in *Apodaca*), the use immunity granted to Spikes does not involve the application or

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[4] In fact, we believe that transactional immunity is more clearly a legislative, as opposed to executive, function under the New Mexico Constitution than under the United States Constitution due to the fact that the Governor's power of pardon is limited to the time after conviction. *See* NM Const. art. V, § 6 (limiting Governor's power of pardon to time after conviction); U.S. Const. art. II, § 2 (vesting pardon power in the President); *Ex Parte Garland,* 71 U.S. (4 Wall.) 333, 380 (1866) (interpreting the President's power of pardon to apply anytime after the commission of an offense). *Compare Brown,* 161 U.S. at 638 (Field, J., dissenting) (contending that Congressional immunity statutes improperly interfere with the President's pardon power), *with Doyle v. Hofstader,* 177 N.E. 489, 500 (N.Y. 1931) (Pound, J., concurring in part, dissenting in part) (concluding that immunity from prosecution falls under the legislative power of amnesty rather than the executive power of pardon based on limiting language in the New York Constitution), *cited with approval in Apodaca,* 53 N.M. at 521, 212 P.2d at 429.

suspension of legislative enactments. Rather, use immunity has a dual function: (1) compelling a reluctant witness to testify in furtherance of the application of the criminal law; and (2) protecting the witness's constitutional privilege against self-incrimination by precluding the use of particular evidence in future proceedings. We believe both of these functions, as applied in court proceedings, inhere in the judiciary.

{61} "The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence." *Kastigar v. United States,* 406 U.S. 441, 443 (1972). Flowing from the judicial function of "determining the facts upon which the substantive rights of the litigant rest," *Ammerman v. Hubbard Broadcasting, Inc.,* 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976), courts have the inherent power to compel the attendance and nonprivileged testimony of witnesses. *See* Rule 11-501 NMRA 1998 (providing that "no person has a privilege to: . . . refuse to be a witness; or . . . refuse to disclose any matter" except as provided by constitution or court rules). To enforce this power, courts inherently possess the ability to hold witnesses in contempt for failing to testify pursuant to court order. *See State ex rel. Bliss v. Greenwood,* 63 N.M. 156, 161-62, 315 P.2d 223, 227 (1957). Additionally, courts are charged with power over testimonial and evidentiary privileges as matters of evidence. *See Ammerman,* 89 N.M. at 309-12, 551 P.2d at 1356-59. Finally, the judiciary has the power to enforce and interpret constitutional provisions, including the Fifth Amendment privilege against self-incrimination, and if necessary to effectuate those constitutional provisions, the judiciary is obligated to proscribe the use of particular types of evidence. *See State*

v. Gutierrez, 116 N.M. 431, 444-47, 863 P.2d 1052, 1065-68 (1993) (stating that "the people of New Mexico left to the courts the task of interpreting" constitutional language, and clarifying that the exclusionary rule in New Mexico is a matter of constitutional interpretation). Therefore, to the extent that use immunity serves to compel testimony in a judicial proceeding and serves to establish an evidentiary safeguard to protect the right against self-incrimination, we conclude that it is within our power of "superintending control over all inferior courts" of New Mexico to enact rules governing this type of immunity. *See* NM Const. art. VI, § 3; *cf. State v. Seward,* 104 N.M. 548, 554, 724 P.2d 756, 762 (Ct. App. 1986) ("It is not within the legislature's purview to establish or regulate constitutional or judicial procedural rights. . . .").

{62} We recognize that numerous decisions of federal courts place the power over use immunity in the legislative and, by federal statute, the executive branches of government. *See, e.g., United States v. Perkins,* 138 F.3d 421, 424 (D.C. Cir.), *cert. denied,* 118 S.Ct. 1853 (1998); *United States v. Lenz,* 616 F.2d 960, 962 (6th Cir. 1980) ("[C]ourts have no inherent power to grant immunity. Nor has the Constitution been construed to authorize courts to compel testimony despite the witness' claim of self-incrimination privilege. Rather, use immunity is a statutory creation.") (citations omitted); *United States v. Rocco,* 587 F.2d 144, 147 & n.10 (3d Cir. 1978) (citing cases and stating that "it has been uniformly accepted that the grant or denial of immunity is within the sole discretion of the executive branch of government"). However, all of these cases derive their authority, in part, from *Earl v. United States,* 361 F.2d 531, 534 (D.C. Cir. 1966).

{63} In *Earl,* then-Circuit Judge Burger, speaking for the court, stated:

> What Appellant asks this Court to do is command the Executive Branch of government to exercise the statutory power of the Executive to grant immunity in order to secure relevant testimony. This power is not inherent in the Executive and surely is not inherent in the judiciary. In the context of criminal justice it is one of the highest forms of discretion conferred by Congress on the Executive, *i.e.,* a decision to give formal and binding absolution in a judicial proceeding to insure that an individual's testimony will be compelled without subjecting him to criminal prosecution for what he may say. The effect of the immunity grant avoids any incrimination. . . . We conclude that the judicial creation of a procedure comparable to that enacted by Congress for the benefit of the Government is beyond our power.

Id. The Court in *Earl,* therefore, was concerned with transactional immunity rather than use immunity, and as we indicated above, we believe different considerations apply in the context of use immunity. *But see United States v. Allstate Mortgage Corp.,* 507 F.2d 492, 494-95 (7th Cir. 1974) (concluding that the principles articulated in *Earl* apply equally to use immunity). Additionally, decisions of the United States Supreme Court indicate that courts may compel testimony over the privilege against self-incrimination and, to protect the privilege, preclude the future use of that testimony for purposes of criminally prosecuting the witness. *See Simmons v. United States,* 390 U.S. 377, 394 (1968) (holding that a defendant's testimony in furtherance of a motion to suppress evidence on Fourth Amendment grounds is not admissible at trial to pro[illegible] guilt); *Murphy v. Waterfront Comm'n,* 378

U.S. 52, 79 (1964) (adopting an "exclusionary rule" whereby the federal government is precluded from using a state witness's testimony, or fruits of the testimony, compelled under a state immunity agreement). *But see Pillsbury Co. v. Conboy,* 459 U.S. 248, 261 (1983) (stating in dicta that "[n]o court has authority to immunize a witness"). These decisions indicate that the judiciary has the inherent power to grant use immunity as long as it does not infringe upon the legislative power of amnesty or the prosecutorial discretion of the executive. Finally, the federal cases concluding that the judiciary possesses no authority to grant immunity relied on the existence of a federal statute placing that authority in the executive branch. *See Ellis v. United States,* 416 F.2d 791, 796-97 (D.C. Cir. 1969) ("This is an area that has been considered by Congress and where it has acted with care and particularity, limiting the power to grant immunity-in the presence of a valid claim of privilege-to a limited group of federal officials. We need not consider what would be the legal situation in the absence of such a statute. With that statute on the books, the power to grant immunity is plainly outside the judicial province.") (footnotes omitted). By contrast, we have no such statute in New Mexico. *See State v. Cheadle,* 101 N.M. 282, 286, 681 P.2d 708, 712 (1983) ("Since there is no constitutional provision or statute in this State allowing application for the granting of immunity to defense witnesses, we must follow the rule of criminal procedure. . . .").

{64} We conclude that Rule 5-116 and the district court's grant of immunity to Spikes do not interfere with the Legislature's amnesty power. We also conclude that, because the rule requires application of the prosecuting attorney, *see Cheadle,* 101 N.M. at 286-87, 681 P.2d at

712-13 (rejecting a claim for authority by a defendant to demand witness immunity), the grant of use immunity under Rule 5-116 does not interfere with the prosecutorial discretion of the executive. *But cf. United States v. Mohney,* 949 F.2d 1397, 1401 (6th Cir. 1991) ("Compelled judicial use immunity could . . . impair the subsequent prosecution of the witness."); *United States v. Turkish,* 623 F.2d 769, 775-76 (2d Cir. 1980) (discussing the potential negative impact of use immunity on the prosecution). *See generally United States v. Alessio,* 528 F.2d 1079, 1081 (9th Cir. 1976) ("It has long been recognized that the Executive Branch of government 'has exclusive authority and absolute discretion to decide whether to prosecute a case. . . .'") (quoting *United States v. Nixon,* 418 U.S. 683, 693 (1974)).

b.

{65} In *Kastigar,* the United States Supreme Court held that a federal use immunity statute[5], which compelled testimony notwithstanding a witness's invocation of Fifth

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[5] Whenever a witness refuses, on the basis of his [or her] privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to . . . a court or grand jury of the United States, . . . and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his [or her] privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (1994); *see* 18 U.S.C. § 6003 (1994) (providing for request for order compelling testimony by United States Attorney and for the granting of such an order by a court or grand jury of the United States).

Amendment privilege, survived constitutional scrutiny due to sufficient safeguards against the use of the testimony, or its fruits, in any future prosecution. 406 U.S. at 459-62; *see Vallejos,* 118 N.M. at 575-77, 883 P.2d at 1272-74. Smith might contend that Rule 5-116, unlike the statutory immunity at issue in *Kastigar,* does not protect Spikes' Fifth Amendment rights with sufficient certainty. However, we conclude that Smith lacks standing to argue such a claim. *Compare United States v. Skolek,* 474 F.2d 582, 584 (10th Cir. 1973) ("The privilege against self-incrimination is solely for the benefit of the witness and is purely a personal privilege of the witness, not for the protection of other parties."), *and People v. Douglas,* 788 P.2d 640, 656 (Cal. 1990) (en banc) ("[D]efendant lacks standing to object to any perceived violation of [the witness's] privilege against self-incrimination. That right is personal, and may not be vicariously asserted by another."), *with Ellis,* 416 F.2d at 799 (concluding that, although "[o]rdinarily a defendant does not have standing to complain of an erroneous ruling on the scope of the privilege of a witness," a "defendant does have standing . . . to complain that [a] conviction was obtained in a case where the trial judge went outside [the] judicial province to grant immunity to a witness").

{66} In any event, we see no discernible difference between a statutory provision and comparable, properly enacted, court rules; Rule 5-116 and Rule 11-412 leave "the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege" and, therefore, are "coextensive with the privilege," *Kastigar,* 406 U.S. at 462. Certainly, in any subsequent prosecution of Spikes, the State, as with statutory immunity, will be subject to the same burdens

imposed by *Kastigar. See Vallejos,* 118 N.M. at 577, 883 P.2d at 1274 (discussing the prosecutorial burdens established by the United States Supreme Court in order to protect against Fifth Amendment violations). We believe that Rule 5-116 and Rule 11-412 strike a constitutionally permissible balance between the State interest in prosecuting crime and the private interest against self-incrimination. The only substantive distinction between the immunity discussed in *Kastigar* and the immunity provided in Rule 5-116 and Rule 11-412 lies in the branch of government empowered to enact such a provision in the Federal government as compared to the State of New Mexico. *Cf. Maples v. State,* 110 N.M. 34, 39, 791 P.2d 788, 793 (1990) (Montgomery, J., dissenting) (discussing New Mexico's separation of powers doctrine in relation to matters of court procedure and noting a greater participation by Congress at the federal level as compared to the New Mexico Legislature at the state level).

{67} We hold that the judicial branch is a proper arm of government under the New Mexico Constitution to establish and administer use immunity. We also hold that Rule 5-116 and Rule 11-412 satisfy the requirements of the Fifth Amendment to the United States Constitution. Therefore, we reject Smith's contention that the district court lacked the authority to immunize Spikes' testimony and affirm the district court's reliance on Rule 5-116 in the context of a court proceeding.

4. Defendant Smith failed to lay a proper foundation for Spikes' character testimony about other witnesses.

{68} Smith claims that his case was damaged when the trial court refused to allow Smith to question Spikes about

her opinion of the prosecution witnesses' character for truthfulness. While Smith was entitled to inquire into the reputation of witnesses for truthfulness, he had to lay a foundation for doing so. He did not do this, and therefore, his claim has no merit.

{69} "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness. . . ." Rule 11-608 NMRA 1998. A proper foundation must be laid. *Construction Contracting & Management, Inc. v. McConnell*, 112 N.M. 371, 376, 815 P.2d 1161, 1166 (1991). Both Spikes and Lucero testified that they did not know each other well. O'Grady, rather than Spikes, testified subsequently that they were good friends. We conclude that Smith failed to lay a proper foundation for Spikes' opinion of Lucero's and O'Grady's veracity. Spikes did testify that Jimenes had been a "close friend." Spikes' other testimony, however, sufficiently indicated her opinion of Jimenes' veracity. Spikes clearly believed Jimenes' testimony that contradicted her own was untrue. We conclude that if the trial court erred in denying Spikes' opinion of Jimenes' veracity, the error was harmless.

C. Accomplice Witness Instruction, Sufficiency of Evidence, and Due Process.

{70} Defendants argue that the trial court erred in failing to give an instruction cautioning the jury to carefully weigh the immunized testimony of Lucero. As Defendants concede, we do not require courts to give instructions specifically cautioning a jury in considering immunized accomplice testimony. Rather, we only require

that the trial court instruct the jury generally with respect to witness credibility. *State v. Ortega,* 112 N.M. 554, 575, 817 P.2d 1196, 1217 (1991). The trial court so instructed the jury, using UJI 14-5020 NMRA 1998 ("You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account [the witness'] truthfulness or untruthfulness, [the witness'] ability and opportunity to observe, his [or her] memory, his [or her] manner while testifying, any interest, bias or prejudice [the witness] may have and the reasonableness of [the witness'] testimony considered in the light of all the evidence in the case."). We conclude that the trial court did not err by refusing to give an additional jury instruction specifically relating to the credibility of accomplice witnesses.

{71} We recently declined to require a cautionary instruction concerning accomplice testimony in *State v. Sarracino,* 1998-NMSC-022, ¶ 17, ___ N.M. ___, ___ P.2d ___. In *Sarracino,* we discussed the rationale of other states and the federal government in requiring or approving an instruction cautioning the jury to more closely scrutinize accomplice testimony. *Id.* ¶¶ 14-16. We noted that accomplice testimony has been viewed, historically, with suspicion, and we emphasized "the due process requirement that there be sufficient evidence to support, beyond a reasonable doubt, every element essential to the crime charged." *Id.* ¶ 14. We concluded in *Sarracino* that, under the facts of that case, the general witness credibility instruction adequately informed the jury of its responsibility in reviewing the accomplice testimony. *Id.* ¶ 17.

{72} We believe the majority of Defendants' arguments on appeal reinforce our emphasis on due process and

sufficiency of the evidence in *Sarracino.* The essence of Defendants' appeal concerns the fact that the State relied so heavily on the accomplice testimony of Spikes and Lucero. Defendants separately attack the immunity of both accomplices (claiming Lucero's to be coercive and Spikes' to be without authority), the State's attempts to bolster the accomplices' testimony (claiming the prior consistent statements related by Satomba, O'Grady, and Jimenes to be hearsay), and, finally, the blocked attempts to attack the credibility of prosecution witnesses (focusing on the inability to introduce Lucero's prior arrests and Spikes' opinion about other witnesses' truthfulness). We believe that, viewing these arguments in combination, Defendants basically contend that Spikes' and Lucero's testimony is not sufficiently reliable to constitute sufficient evidence to sustain a conviction beyond a reasonable doubt as a matter of due process.

{73} As we concluded in *Sarracino,* however, we believe there is sufficient evidence corroborating the accomplice testimony in this case to satisfy the dictates of due process. Both Spikes and Lucero testified to a similar sequence of events, even though both were involved in different aspects of the crime and had limited contact with each other prior to the crime and before the trial. Additionally, the physical evidence discovered by the police at Lucero's house corroborated many details of Lucero's testimony and was consistent with the condition in which the police found Younger's body. Defendants had, and employed, every opportunity to cross-examine both Lucero and Spikes. They then argued in closing that neither witness was credible. Defendants have not shown any persuasive reason to change the rule we currently have. We hold the jury was sufficiently instructed.

V. FEAR TESTIMONY

{74} Finally, Defendants claim that the admission of Satomba's, O'Grady's and Jimenes' testimony that they feared Defendants was error. This is an issue of first impression in New Mexico. Other courts which have reached this issue have held that a witness may testify regarding his or her fear of a defendant if the testimony is elicited to explain a delay in reporting the crime or admitting knowledge of the crime to the police. *See State v. Coffey,* 480 S.E.2d 664, 672 (N.C. 1997). "In general, questions concerning a witness's fear of testifying are appropriate in the judge's discretion." *Commonwealth v. Fitzgerald,* 381 N.E.2d 123, 131 (Mass. 1978); *accord Commonwealth v. Auguste,* 639 N.E.2d 388, 390 (Mass. 1994). We adopt this rule.

{75} Each of these witnesses failed to report what they knew about the crime immediately. The prosecution was allowed to show why the witnesses delayed in contacting police. The trial court did not err in admitting the testimony of witnesses that they feared Defendants.

VI. CONCLUSION

{76} Defendants are not entitled to a new trial or to a remand for a *Brady* hearing. The trial court did not err in admitting Lucero's testimony or that of Spikes, nor in admitting testimony of Lucero's statements to Satomba, of Spikes' statements to Jimenes, and of Spikes' prior inconsistent statements to O'Grady. We agree that the trial court erred in admitting hearsay testimony of Spikes' prior consistent statements to O'Grady but hold that the error was harmless. The trial court did not err in refusing to allow Spikes to offer her opinion of the veracity of Lucero

and O'Grady. If the court erred in denying Spikes' opinio of Jimenes' veracity, the error was harmless. The tri court did not err in admitting the stipulated testimony Karen Thomas or the evidence that various witnesse delayed reporting to police because they feared Defe dants. The trial court did not err in failing to give a instruction cautioning the jury to view the testimony Lucero and Spikes with suspicion or in refusing to instru on voluntary manslaughter. The cumulative error doctrin is not applicable. Defendants have not shown a sufficie basis for compelling disclosure of additional evidence. W therefore affirm the convictions.

{77} **IT IS SO ORDERED.**

/s/ Pamela B. Minzner
PAMELA B. MINZNER, Justice

WE CONCUR:

/s/ Gene Franchini
GENE E. FRANCHINI, Chief Justice

/s/ Joseph Baca
JOSEPH F. BACA, Justice

/s/ Patricio M. Serna
PATRICIO M. SERNA, Justice

/s/ Dan A. McKinnon
DAN A. McKINNON, III, Justice